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Supreme Court of the United States

OCTOBER TERM, 1948.

FRANK LOBAIDO, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

MOTION TO DISPENSE WITH PRINTING OF RECORD OF RECORDER'S COURT FOR THE CITY OF DETROIT, MICHIGAN.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN, NO.

PETITION FOR A WRIT OF CERTIORARI TO THE RECORDER'S COURT FOR THE CITY OF DETROIT, MICHIGAN, NO.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. . .

FRANK LOBAIDO, *Petitioner*,

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

MOTION TO DISPENSE WITH PRINTING OF RECORD OF RECORDER'S COURT FOR THE CITY OF DETROIT, MICHIGAN.

Counsel respectfully moves that this Court dispense with the printing of the record of the Recorder's Court for the City of Detroit, Michigan, in this cause, and assigns as grounds for this motion:

1. This motion is filed with petitions for writs of certiorari to the Supreme Court of the State of Michigan and the Recorder's Court for the City of Detroit, Michigan.

2. On January 13, 1948, said Supreme Court entered an order denying petitioner's application for leave to appeal to it from the judgment and sentence of said Recorder's Court, and on February 17, 1948, said Supreme Court entered its order denying petitioner's motion for reconsideration. Counsel has found no case which came to this Court on certiorari to the Michigan Supreme Court wherein the latter court denied application for leave to appeal. Counsel believes that there is doubt as to whether petitioner should pray that certriorari issue to said Supreme Court or to said Recorder's Court. Cf. *Western Union Tel. Co.* v. *Crovo*, 220 U. S. 364; *Norfolk & S. Turnpike Co.* v. *Virginia*,

225 U. S. 264; *Matthews* v. *Huwe,* 269 U. S. 262; *Myers* v. *International Trust Co.,* 273 U. S. 380; *Tumey* v. *Ohio,* 273 U. S. 510; *Western Union Tel. Co.* v. *Priester,* 276 U. S. 252; *Chesapeake & O. Ry. Co.* v. *Kuhn,* 284 U. S. 44. Therefore counsel believes that petitioner should petition for writs of certiorari to both said Supreme Court and said Recorder's Court.

3. With this motion and attached petitions for writs of certiorari are filed the certified transcript of record in said Supreme Court and 40 printed copies thereof. Such transcript includes a so-called Concise Statement of Facts and Proceedings with exhibits certified by the Judge of said Recorder's Court and the proceedings in said Supreme Court on application for leave to appeal.

4. There is also filed with the document specified in paragraph 3, *supra,* the certified transcript of record of said Recorder's Court. This transcript includes sixteen typewritten volumes of proceedings in said Recorder's Court and various typewritten and photostated documents and exhibits. The printing of said transcript of said Recorder's Court would be expensive and beyond the means of petitioner. Counsel verily believes that the printing of said transcript is not necessary to adequate presentation to this Court of the merits of petitioner's cause, especially in view of the printing of the said Supreme Court transcript.

5. The Hon. Edmund E. Shepherd, Solicitor General of the State of Michigan, has, by stipulation dated May 14, 1948, stipulated to dispense with the printing of said transcript of said Recorder's Court. Said stipulation is filed with this motion.

WHEREFORE petitioner respectfully moves that this Court dispense with the printing of the record of the Recorder's Court for the City of Detroit, Michigan, in this cause.

DAVID W. LOUISELL,
Counsel for Petitioner.

Dated June, 1948.

Supreme Court of the United States

OCTOBER TERM, 1948

FRANK LOBAIDO, *Petitioner*

v.

THE PEOPLE OF THE STATE OF MICHIGAN

No. .

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

No. .

PETITION FOR A WRIT OF CERTIORARI TO THE RECORDER'S COURT FOR THE CITY OF DETROIT, MICHIGAN.[1]

OPINION BELOW.

No opinions were written below, the Recorder's Court for the City of Detroit, Michigan (hereinafter called Recorder's Court) having entered only an order without

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[1] The reasons why petitioner petitions for certiorari both to the Michigan Supreme Court and the Recorder's Court are set forth in petitioner's prefixed motion to dispense with the printing of the record of the Recorder's Court. With these petitions are filed the certified transcript of record of the Michigan Supreme Court, and forty printed copies thereof, herein referred to as "R." with appropriate page numbers, and the certified transcript of record of the Recorder's Court consisting of sixteen typewritten volumes of trial proceedings, herein referred to as "Tr." with appropriate page numbers, and various typewritten and photostated trial court documents without consecutive pagination, herein referred to simply as "Tr.".

memorandum denying petitioner's motion for a new trial (R. 2), and the Supreme Court of Michigan having entered only an order denying petitioner's application for leave to appeal (R. 124, 129).

JURISDICTION.

The order of the Supreme Court of Michigan denying petitioner's application for leave to appeal was entered January 13, 1948, and its order denying petitioner's motion for reconsideration was entered February 17, 1948 (R. 124, 129). The order of a Justice of this Court extending to and including June 17, 1948, the time within which to petition for certiorari, was entered May 10, 1948 (R. 131). Jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

Whether the due process of law and the equal protection of the laws guaranteed by the Fourteenth Amendment are denied where a defendant, charged with rape and attempted murder of a seven-year-old girl, is denied a continuance, is tried during a period of extreme public excitement and sensational newspaper publicity and is convicted and sentenced to imprisonment which will last for life, defendant steadfastly denying guilt, the objective scientific evidence substantiating such denial, the evidence of identification by the girl being gravely doubtful, and

(a) defendant's right of cross-examination of the girl is substantially curtailed by the court in matters of basic importance;

(b) the prosecuting officials make seriously prejudicial statements to the jury disparaging the defense and counsel for defendant including statements calculated to convey that counsel is wasting the time of court and jury in presenting a defense;

(c) the court fails to restrain and largely approves the conduct of the prosecutors and makes similar seriously prejudicial statements to the jury;

(d) police officials before trial destroy the best blood and serum specimens, thus obviating use at the trial of the most probatively significant data, namely, objective scientific evidence;

(e) the jury apparently hears hawked a prominent newspaper headline falsely stating that defendant has confessed guilt and the court refuses to permit inquiry of the officers in charge of the jury as to whether the jury has in fact heard such headline;

(f) the members of the jury during trial are furnished by a police matron in charge of the confined jury, commodities then highly valued, namely, nylon stockings, and the court refuses to permit inquiry into the facts surrounding this incident; and

(g) the Michigan Supreme Court refuses to exercise its power to permit appeal to remedy the essential unfairness.

CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourteenth Amendment provides in part, "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT.

Proceedings to Date.

On January 27, 1946, petitioner was arrested for investigation of rape. On February 4, 1946, a warrant was issued out of Recorder's Court charging him with statutory rape and an assault upon Rosalie Giganti, age 7, with intent to kill and murder her (R. 1). At an examination held February 25, 1946, petitioner was bound over to Recorder's Court for trial (R. 1, Tr.). An Information charging the stated offenses was filed in Recorder's Court February 28, 1946, bail thereafter fixed at $50,000.00, and petitioner retained in custody (Tr.). Petitioner on April 1, 1946,

filed in Recorder's Court a motion, renewed April 8, 1946, for a continuance, which was denied (R. 2). Petitioner was tried by jury in Recorder's Court and on April 25, 1946, was found guilty of both charges (R. 2). On May 1, 1946, he was sentenced to two terms of imprisonment, each of forty years to life, the court recommending confinement for life (R. 2, Tr.). His motion for a new trial was filed May 17, 1946, and was denied without opinion December 24, 1946 (R. 2). The so-called "Concise Statement of Facts and Proceedings," upon which petitioner under Michigan procedure, applied to the Michigan Supreme Court for leave to appeal, was certified by the Recorder's Court May 27, 1947 (R. 80). Such application for leave to appeal was filed in the Michigan Supreme Court October 9, 1947, and the People's brief in opposition was filed January 3, 1948 (R. 122-123). The application was denied without opinion January 13, 1948, and a motion for reconsideration, filed February 10, 1948, was denied without opinion February 17, 1948 (R. 123, 124, 129-130). Upon application of counsel for petitioner a Justice of this Court, by order dated May 10, 1948, extended to and including June 17, 1948, the time for petitioning for certiorari (R. 131).

The Facts.[2]

On Sunday, January 27, 1946, Rosalie Giganti, a girl then seven years old, was found in an alleyway, about 4:00 or 4:15 o'clock in the afternoon, in a commercial-residential section of Detroit, Michigan, with her throat cut and in a critical condition (R. 17; Tr. 797, 802, 811). She was taken

[2] Ever mindful of the restricted scope of this Court's supervision under the Fourteenth Amendment of the states' judicial processes, and that petitions for certiorari must be concise, nevertheless counsel in this case find it inescapably necessary—because deprivation of constitutional rights here impermeates the entire record—to present in substantial detail the facts involved in order properly to assist this Court in its task of scrupulously reviewing the record, a task which must be borne where there is grave claim of denial of constitutional rights. Cf. *Avery* v. *Alabama*, 308 U. S. 444, 447.

to a receiving hospital and examined by a doctor in the admitting room who found that she had multiple lacerations of the neck and blood about the pubic area, and lacerations of the vagina and mucous present (R. 17.) She was seriously ill but gradually recovered and testified at the trial (R. 4; Tr. 716, 789, 1368).

The horrible nature of the crime aroused public indignation to a point probably unequalled in the history of Detroit (R. 126). From January 27, 1946, until the commencement of the trial on April 8, 1946, and throughout the trial which terminated on April 25, 1946, the case received newspaper and public attention to an extent unique in the annals of Michigan jurisprudence (R. 126). The sensational treatment by the newspapers and the extreme public reaction are acutely evidenced, among other things, by the fact that during the selection of the jury twenty-one jurors on the panel emphatically proclaimed their conclusion that petitioner was guilty, one stating "There is no use taking anybody's time because I feel the man is guilty and I always have." (R. 2, 115-117), and by the fact that a false newspaper report during the course of the trial, that petitioner had confessed guilt, received such sensational treatment by a Detroit newspaper, consisting of headlines of about an inch and a half size print, which were hawked about Detroit, as to necessitate motion for mistrial (R. 18-20, 27-28, 106-108).

Petitioner was arrested by Detroit police at approximately 6:30 P. M., January 27, 1946, in the No Point Market (Tr. 1027), after going to the market with the police from a nearby saloon, and unlocking the market door for them (Tr. 1019-1020). Petitioner and his brother, Sam Lobaido, were then partners in ownership and management of the market (R. 32, 33). On January 27, 1946, petitioner was the one who was on duty at the market. It was the theory of the prosecution that petitioner, in a back room of the market during the afternoon of January 27, 1946, raped Rosalie Giganti, took her out in the alleyway behind

the market and cut her throat, and placed her in an ash can in the alleyway (R. 3). From the moment of his arrest and continuously ever since petitioner has steadfastly denied guilt (R. 32, 35, 36, 72-73, 125).

There is some uncertainty and inconsistency in the evidence on various circumstantial facts, including the hour petitioner opened the market and the number of customers who entered and left the market during the afternoon, and a change in recollection as to the number of times petitioner left the market during the afternoon.[3] It is believed fair and accurate to state, however, that such uncertainties or inconsistencies are explicable by normal human variations in estimates of time and that, resolving against petitioner each and every such uncertainty and inconsistency, there is no evidence which could possibly establish his guilt except his identification by Rosalie Giganti.

Rosalie testified that she was sent to the No Point Market on Sunday afternoon, January 27, 1946, to purchase bread and milk, that while she was there various people entered

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[3] Petitioner took the stand, testified fully, and was subjected to rigorous cross-examination (R. 33-39, Tr. 2054-2205). He testified that he had played poker at the home of his brother beginning Saturday night after leaving his girl friend, Virginia La Verne (see footnote 8, *infra*) and until about 12:30 P. M. Sunday, January 27, and during the poker game had consumed various alcoholic beverages, but that he was not drunk on such Sunday. He testified that he made a statement to Mr. O'Brien, the prosecuting attorney, on January 28, on which occasion he had not mentioned the poker game because he had not wished to involve the participants, and on which occasion he stated his best recollection at that time that he had left the market only once during Sunday afternoon, whereas he later recalled that in fact he had left the market twice, once for a cup of coffee and a drink and the second time for a drink (R. 33, 34, 35). His statement to the prosecuting attorney was made after the second consecutive night without sleep (R. 34, 35; Tr. 2115). He further testified that the only time the market was locked between the time he opened and closed it for the day, other than the two times mentioned when he left for coffee and drinks, was when he went to the bathroom (R. 33, 34, 37). He testified that he did not know whether Rosalie Giganti came in the store during the afternoon—that there might have been a young girl in the store that day but he was not sure (R. 34).

the store to make purchases, that petitioner gave her a balloon and some pop, that he did not detain her in any way except to look at her, that he later took her in the back room of the market, laid her on the table, sat her down, did something bad to her, and then took her out in the alleyway, cut her throat and placed her in an ash can from which she later succeeded in getting out (R. 4).

Rosalie's first "identification" of petitioner was made when she was unable to speak and could only nod, and petitioner was brought into her presence handcuffed to a police officer and was pointed out to her by the assistant prosecutor with the statement "That is Frank? That is the man that cut you?" (R. 16, 60). While still at the hospital, Rosalie on February 4, 1946, made a statement to Mr. O'Brien, the prosecutor, that "Jack" "cut my throat" (R. 13, 14). At the trial she explained this statement by saying that when she was real sick she thought Jack did it but later she found out that Frank Lobaido had done it (R. 9). "I said after a few days, after I thought it was either one, and then I caught up to the name it was Frank." (Tr. 1399). Between the time of her statement that "Jack" "cut my throat" and the trial, petitioner's name had been mentioned to her by her nurse from the newspaper stories (R. 9). At the preliminary examination Rosalie first identified a person other than petitioner as the man who had committed the crime, apparently petitioner's brother (R. 13, 36-37; Tr., examination pp. 25-26). Rosalie's testimony contained a number of inconsistencies of varying significance.[4]

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[4] Among other inconsistencies, Rosalie at first said that she had been sent to the store by her father, but later said that she had been sent by her mother (R. 4). Her versions as to when and where in the market she got the balloon and pop differed radically (Tr. 720, 777-778, 1382-1383). Her only explanation as to why she had not left the market when other people were in the market and she was obviously unrestrained physically by petitioner was that petitioner kept looking at her (R. 5). She testified that when she was alone in the store with petitioner she was crying out loud but that when other people were in the store she was "crying on the inside" (R. 5).

Other than the testimony of Rosalie, the only evidence of real probative significance is what may be termed the scientific evidence.[5] Two witnesses gave such evidence, Albert Langtry, a Detroit policeman assigned to the police laboratory, called by the prosecution, and Dr. Arthur W. Frisch, called by petitioner. Without deducing in such manner as would be appropriate in argument before the trier of facts, those inferences suggested by a contrast between the professional status, standing and working techniques of these two witnesses, it is enough to point out that the People acquiesced in the high standing of Dr. Frisch and the accuracy of his work in this case (Tr. 2399).[6]

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[5] It is submitted that a careful appraisal of this evidence would establish in any fair-minded trier of facts gravest doubts of petitioner's guilt, if indeed such appraisal does not conclusively show that petitioner could not be guilty.

[6] It should, however, be pointed out that Albert Langtry, the police department expert, had only an elementary degree in chemistry (R. 42; Tr. 1785); that his transfer in 1941 to the scientific laboratory of the police department was prefaced by only eighteen weeks of night school study on "bombs and explosives" (Tr. 1784); that he does not study or read other professional authorities but relies only on his own experience (R. 42); that to ascertain the presence of seminal fluid he used the so-called ultra-violet light test (Tr. 1789-1790) which is meaningless (Tr. 2407); that he did not run a fourth test on specimens suspected of being blood, although such test is a *sine qua non* for the establishment of human blood (R. 44, 45, 47-50); that he kept no protocol or other account of his tests as he made them and did not in fact know what a protocol was (R. 42; Tr. 1814); and most important of all, that he destroyed the specimens from which he worked after completing his tests, thus forever removing them from the possibility of further check (R. 42). His testimony reflects the extreme self-assurance and positivism of those of little learning. Dr. Frisch, on the other hand, holds a degree of Doctor of Philosophy in Bacteriology and Immunology. Since 1937 he has been an Associate Professor at Wayne University College of Medicine. He had served for three years while in the Army as Assistant Chief of the Laboratory Section of Percy Jones General Hospital, and had engaged at intervals since 1932 in the study of blood types (R. 45-46). He is clearly shown to be a scrupulous witness sincerely devoted to accurate scientific technique. He kept full protocol on each test and the specimens with which he worked (Tr. 2384).

Albert Langtry had access immediately following January 27, 1946 (Tr. 1827-1828, 1884), to clothing of Rosalie, clothing of petitioner, a white coat used in the market as a clerk's coat, scrapings from the floor of the market and from the bar on the back door of the market, and to alleged scrapings of petitioner's finger nails, although petitioner denied that any finger nail scrapings had been taken (Tr. 2104). Langtry testified that he found blood and seminal fluid on certain garments of Rosalie and blood and seminal fluid on certain garments of petitioner, and blood on the white coat, and that the scrapings from the floor and bar on the back door of the market and from the finger nails of petitioner contained blood (R. 43). His test for seminal fluid was exposure of spots on the garments to the ultra-violet ray light (Tr. 1789-1790), which test is meaningless (Tr. 2407). In connection with his blood tests, he did not run in any instance the vital so-called fourth test (R. 44, 45), which is indispensable to establishment of human blood (R. 47-50), and the failure to run such test raises grave doubt about his conclusion that the scrapings contained human blood, since protein substances normally found in a market, such as vinegar, fruit acids, sour wine and scouring powder (R. 48) would survive the first three tests (R. 47-50). Langtry did not attempt to type the blood or seminal fluid on any of the garments or in the scrapings although this could have been done (R. 42). He threw away or destroyed before trial all of the specimens and slides with which he worked (R. 42). He kept no protocol on any of his tests (R. 42), but only remembered his net conclusions. His reason for not keeping the specimens was that there was no room in the police department to do so (Tr. 1765), but he later admitted that "there is a possibility" of such room, and that the other exhibits (including bulky clothing and a large garbage can) had been stored in the police property office (Tr. 1906).[7]

[7] That Langtry threw away or destroyed all specimens and slides with which he worked, see Tr. 1761, 1765, 1801-1802, 1812, 1813-1814, 1827, 1829, 1832, 1833, 1838-1839, 1842, 1844, 1867, 1869,

Dr. Frisch testified that there are four human blood types:

> "(1) Only the substance 'A' present. 40 to 45% of the people have this type.
>
> (2) Only the substance 'B' present. 6 to 8% of the people have this type.
>
> (3) Blood having both 'A' and 'B' factors. 2 to 3% of the people have this type.
>
> (4) Blood which has neither 'A' or 'B' factors. This is type 'o' and the remainder of the people have this type." (R. 46.)

All human blood can easily be typed (Tr. 2361, 2363). A man's seminal fluid invariably follows his blood type and can also readily be typed (R. 46).

Dr. Frisch during the course of the trial was permitted to take specimens from the various garments of Rosalie and petitioner, and from the white coat. However, by this time all of the alleged specimens of seminal fluid taken from Rosalie's garments had already been removed and destroyed by the police without typing (Tr. 1903-1904, 1905-1906), and were thus unavailable for testing by Dr. Frisch. Similarly, the best blood specimens from petitioner's garments had already been removed and destroyed by the police without typing (Tr. 1757, 1758, 1826, 1829, 1835, 1844-1845, 1858, 1880), but on the remaining specimens from petitioner's garments, and on specimens from the white coat, Dr. Frisch ran the standard chemical tests to ascertain human blood and to type it (R. 46-47). Since the scrapings from the floor of the market and bar on the back door and the alleged scrapings from the finger nails of the petitioner had been destroyed, Dr. Frisch could not run tests on these (Tr. 1882-1883, 1885, 1888-1889, 1890, 1891, 1892).

1872, 1877, 1879, 1885, 1890, 1891, 1892, 1895, 1904, 1905-1906. Trial counsel in this case has been informed since the conclusion thereof that it is now the practice of the police department to retain all specimens and tests.

Petitioner's blood and seminal fluid are type A. Rosalie's blood is type B (R. 46; Tr. 2367).

It was the hypothesis of the People that the blood found on petitioner's clothes, his handkerchief, trousers and underwear or "shorts", was Rosalie's blood. But Dr. Frisch was unable to demonstrate the B factor in the blood on such garments (R. 46-47), although he readily demonstrated the B factor in specimens of blood taken from Rosalie's garments (Tr. 2369, 2370-2371, 2385). It was further the theory of the People that the blood on the white coat was Rosalie's blood. But Dr. Frisch established that such blood although human was not type B blood (R. 46-47; Tr. 2368-2371). It therefore could not have been Rosalie's blood. The conclusion that the blood on such coat was not Rosalie's blood could be expressed more positively than the conclusion respecting the blood found on petitioner's garments, because the specimens of blood on such coat available for Dr. Frisch's testing were more adequate than the remaining specimens on petitioner's garments (R. 47; Tr. 2405-2406).[8]

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[8] Virginia LaVerne, 19 years old, petitioner's girl friend, testified that she had had sexual intercourse with petitioner in the back room of the market about 11:00 P.M. on January 26, 1946, and thought at the time that her menstrual period had ended, but that when she got home that night she found her underwear had blood stains on it (R. 39). This testimony accorded with petitioner's, that such intercourse had taken place and that he and Virginia had used the white coat to wipe off their private parts (R. 34). Virginia LaVerne's blood type is "O", and the probabilities are that the blood on the white clerk's coat was type "O" (R. 47). On further examination by the People the next day, after staying all afternoon and night at the prosecutor's office and police headquarters, Virginia LaVerne said that her testimony of the previous day was a lie, and denied ever having had intercourse with petitioner (R. 39; Tr. 1671). The unreliability of her testimony on this second occasion is apparent from the fact that still later she admitted having gone to the Lillibridge Hotel (obviously for sexual intercourse) but said that she did not know whether she had gone there with petitioner (R. 41), and admitted that she previously had told defense counsel, that she had had intercourse with petitioner at such hotel (R. 42), as well as in the market.

Dr. Frisch tested the clothing of Rosalie for the presence of seminal matter, but he found no stains that he could believe with certainty to not contain blood. Therefore the slide mentioned in the next paragraph was the only definite seminal stain Dr. Frisch had to examine (R. 46-47).

When Rosalie was taken to the hospital the seminal fluid taken from her pubic area was preserved on a slide (R. 42, 46). This was the only specimen of scientific evidence preserved by the People, and thus the only specimen utilized by the People which was also available to Dr. Frisch (R. 42, 46-47). Dr. Frisch could not demonstrate the presence of the A type of seminal fluid, concededly petitioner's type, in this specimen (R. 46-47). The type of such seminal fluid appeared to be the B type, but Dr. Frisch could not be positive about this since the B factor might have been made apparent by the fact that Rosalie's blood is B type (R. 46-47). A typing of this seminal fluid before it had deteriorated probably would have been possible, as would have been a typing of the destroyed alleged seminal specimens (R. 47; Tr. 2410). It therefore seems reasonably clear that taking the scientific evidence togther it establishes:

A. The blood on the white clerk's coat was not Rosalie's blood and the blood on petitioner's garments was probably not Rosalie's blood. Whatever element of uncertainty there is in respect of the blood on such garments was occasioned by the People's destruction without typing of the blood specimens taken from such garments and the tests run thereon. There is nothing in the case to suggest that the blood on the white clerk's coat was different from the blood on petitioner's garments and thus the probability is that the blood on such garments, as well as the blood on the white clerk's coat, was not Rosalie's blood.

B. The seminal fluid taken from the pubic area of Rosalie, and that allegedly taken from her clothing, was probably not petitioner's seminal fluid. Any uncertainty in this connection resulted from the People's failure to type the former prior to

its deterioration to the point where analysis could not produce a conclusive ascertainment of type, and from the People's destruction of the latter without typing.

Conduct of the Trial.

Repeatedly petitioner's cross-examination of People's witnesses, particularly of Rosalie Giganti, was curtailed as repetitious or otherwise improper. On many occasions the prosecuting officials and trial judge made comments disparaging the defense and petitioner's trial counsel. Such curtailment and disparagement are set forth in detail with record references under Reasons for Granting the Writ.

During the trial petitioner called to the court's attention that a prominent false newspaper story, under sensational headlines, to the effect that petitioner had admitted guilt, had been hawked about on the streets under circumstances suggesting that the jury had heard it. Counsel requested the court to inquire of the officers in charge of the jury as to whether the jury, which was confined during the trial, had heard this. The court declined this request, although it did put general questions to the jury as to whether they had heard anything prejudicial, one juror answering in the negative (R. 18-20, 27-28, 106-108).

During the trial petitioner called to the court's attention a newspaper story stating that "Each Lobaido juror given pair of nylons. The Frank Lobaido jury of ten women and four men each got a pair of nylons today. The women got them because of their good spirits during their 2½ weeks of confinement while hearing the grocer's case. The men got them because they didn't want to be outdone by the women. Besides, they are married. Police Matron Mabel Dreyer made the purchase during her lunch hour today but she isn't telling where." (R. 109-110).

Petitioner pointed out the current great value of nylons, the difficulty in procuring them, and the prejudicial effect of the conduct of the police matron, and moved for a mistrial (R. 60-61, 108-111). The court stated that it had made an

investigation and found the jurors had paid for their own. Petitioner pointed out that the vice consisted in the rendering by the public official of a great favor to the jurors, and demanded full interrogation, on oath and in open court, of the officers in charge of the jury to ascertain all surrounding circumstances. The court denied this, stating that he had "investigated that feature of it" and that "under the charge of the Court that matter can all be straightened out" (R. 111). Petitioner's motion for mistrial was denied (R. 109-111). The charge of the court did not advert to this incident (R. 67-75).

MANNER IN WHICH FEDERAL QUESTIONS WERE RAISED.

Petitioner's motion for a continuance before trial, and each contention at trial, the overruling of which is specified below as error, were predicated on the right to a trial essentially fair, which is guaranteed by the Fourteenth Amendment (Tr. 553). In his motion and amended motion for a new trial petitioner expressly relied upon his constitutional right to a fair and impartial trial and expressly invoked the Fourteenth Amendment (Tr., motion, p. 3; amended motion, pp. 2, 5, 6, 7). The Application for Leave to Appeal to the Michigan Supreme Court was expressly predicated on violations of the Fourteenth Amendment (R. 81, 96, 103, 106, 108, 112, 114, 115), as was the motion for reconsideration in such court (R. 127).

SPECIFICATIONS OF ERRORS TO BE URGED.

Michigan's prosecuting officials and the Recorder's Court erred in effecting, and the Supreme Court of Michigan erred in refusing to inquire into and correct, the following violations of the Fourteenth Amendment:

1. Extreme and undue curtailment of the right of cross-examination resulting in substantial denial thereof.

2. Essentially unfair conduct by the prosecuting officials calculated to utilize, for purposes of securing a conviction regardless of guilt, overwhelming community sentiment against petitioner.

3. Improper conduct on the part of the trial court resulting in a trial essentially unfair.

4. Destruction by police officials of the scientific evidence in the case before trial and before availability to petitioner.

5. Contamination of the jury trial resulting in a tribunal essentially unfair by:

   (a) Refusal to permit interrogation of officers in charge of the jury as to whether the jury heard the false newspaper report that petitioner had admitted guilt.

   (b) Furnishing by a police matron in charge of the confined jury during trial of each juror with a highly valued commodity, namely nylon stockings, and refusal of the court to permit inquiry into surrounding circumstances.

6. Two sentences against petitioner, each of forty years to life imprisonment, with recommendation of life imprisonment, predicated on proceedings violative of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT OF CERTIORARI.

The judicial process of Michigan considered in its totality has denied petitioner an essentially fair trial resulting in his imprisonment on two sentences each of forty years to life, contrary to applicable decisions of this Court.

Procedural due process of law means simply a trial which is essentially fair. It precludes a trial dominated by a mob, *Moore* v. *Dempsey*, 261 U. S. 86, 91; convictions secured by confessions obtained by "third degree" methods, *Brown* v. *Mississippi*, 297 U. S. 278, 286; *Chambers* v. *Florida*, 309 U. S. 227, 235; *Ashcraft* v. *Tennessee*, 322 U. S. 143, 155, 327

U. S. 274; *Malinski* v. *New York*, 324 U. S. 401; and convictions obtained through the use of testimony known by the prosecuting authorities to be perjured, *Mooney* v. *Holohan*, 294 U. S. 103; *Hysler* v. *Florida*, 315 U. S. 411, 413. The requirements of due process likewise strike down a judgment based on a plea of guilty induced by deception of state officers, *Smith* v. *O'Grady*, 312 U. S. 329, 334, cf. *Walker* v. *Johnston*, 312 U. S. 275, 286; or reached in proceedings wherein counsel was wrongfully denied or withheld, *Powell* v. *Alabama*, 287 U. S. 45, *Ex Parte Hawk*, 321 U. S. 114, *Williams* v. *Kaiser*, 323 U S. 471; or based upon an irrational presumption, cf. *Tot* v. *United States*, 319 U. S. 463; or reached after arbitrary curtailment of the trial, *Thomas* v. *District of Columbia*, 90 F. (2d) 424 (App. D. C.). All this is true because these things are essentially unfair. Cf. *Palko* v. *Connecticut*, 302 U. S. 319

It is accurate to say that in a factual situation raising the gravest doubts of guilt, Michigan has accorded petitioner judicial process which, considered in its totality, was so essentially unfair as to violate the Fourteenth Amendment. Substantiation of this requires careful review of each element in this unfairness. Accordingly, each is considered, *seriatim*.

(1) Substantial Denial of Cross-examination Prevented a Fair Trial.

The testimony of Rosalie Giganti has sent petitioner to his doom. Her testimony is a necessary prop, if indeed not the only evidence supporting the conviction. She was but seven years of age, subject to the vivid imagination of a child of her years. Her testimony indicates a brilliant mentality which, in a child of seven years, enhances the dangers of imagination and fancy. It is clear that her statement at the hospital that "Jack" "cut my throat" (R. 13, 14), and her identification at the preliminary examination of one other than petitioner (R. 13, 36-37; Tr., examination, pp. 25-26), coupled with the manner in which peti-

tioner was presented to her for identification and the opportunity implicit in the circumstances of implanting in the mind of a seven year old child the notion that petitioner was the criminal (R. 16, 60) would present a serious question to any fair-minded trier of facts as to the reliability of Rosalie's ultimate identification of petitioner. It was therefore essential to a fair trial that petitioner be allowed the widest scope of cross-examination. Without it a judicial proceeding could be nothing but pretense.

> "Every accused person has the right to cross-examine on material facts every witness who testifies against him. This has been the rule ever since the law became certain and stabilized, and is a part of due process, which found its expression in the Fifth and Sixth Amendments to the Constitution. See Hale's History of the Common Law, page 145; Starkie on Evidence (2d Ed.) Vol. 1, page 160." *United States* v. *Keown*, 19 F. Supp. 639, 646 (D. C. Ky.).

In direct negation of the need of comprehensive cross-examination, petitioner's counsel was so restricted here, despite the fact that he attempted to cross-examine with sympathy and humanity, that in truth the right of cross-examination was substantially denied. Repeatedly petitioner was stopped in important cross-examination by the claim that such cross-examination was repetitious or time consuming (R. 6-14, 83-88, 96-99). In a number of instances the objection on the grounds of repetition was wholly ill-founded or grossly exaggerated (R. 84, 93, 97, 99), and in other instances, while it had some technical basis, was unjustifiable in view of the circumstances. Rosalie was first on the stand on April 11 but adjournment of the court prevented completion of cross-examination that day. She was next on the stand for a few minutes on April 12 but because she said she was not feeling well was excused by petitioner's counsel. She was last on the stand on April 17, five days later (R. 119). To the extent that the cross-examination was repetitious, it

was not only proper but absolutely necessary in order adequately to take up the thread of previous questions. Such repetition was particularly necessitated for purposes of laying a foundation for impeachment in view of the changes in Rosalie's various versions. Thus, at the hospital she had said "Jack" "cut my throat" but had later "found out that it was Frank." At the preliminary hearing she had identified a person as the criminal other than petitioner. A most searching and thorough cross-examination was thus necessitated and, in order that it might be efficient and yet comply with the fundamental dictates of humanity, a certain degree of repetition was necessary in sheer fairness to the child as well as to petitioner.

Among the many restrictions on cross-examination, two are of special significance and would of themselves seem to have prevented a fair trial. Thus, although Rosalie in the hospital had said "Jack" "cut my throat," petitioner was precluded from finding out what Rosalie had meant when she said this (R. 11). And perhaps most significant of all, Rosalie's utterly incredible testimony that she had not mentioned the incident at any time to her mother was completely foreclosed as a field of inquiry for petitioner (R. 13-14, 98-99):

> "Mr. Fitzpatrick: Why didn't you talk to your mother about that?
> Mr. O'Brien: I object to that.
> Mr. Fitzpatrick: Why?
> The Court: Sustain the objection.
> Mr. Fitzpatrick: May I ask them to state on the record the basis of the objection.
> Mr. Schemanske: The Court has sustained the objection. The Court don't need any explanation." (R. 99.)

Proper inquiry in this connection might have exposed the deep mystery about this case that the student of this record can not escape sensing. It will be noted that the People had refused to endorse Rosalie's mother as a res gestae

and material witness, and the court had denied petitioner's motion that she be so endorsed (R. 2, 63-67).[9]

(2) The Conduct of the Prosecuting Officials Prevented a Fair Trial.

It must always be borne in mind that this case was tried in the throes of sensationalism probably unique in Michigan's history (R. 126). Twenty-one members of the jury panel were emphatic in their opinion that petitioner was guilty, one expressing the prevalent sentiment that a trial was a waste of time (R. 2, 115-117). Newspaper publicity was so extreme as probably to be without parallel in the state's history (R. 126). The jury was confined during the course of the trial which commenced April 8 and ended April 25 (Tr. 1, R. 2, 3) and which included the holiday season of Easter (April 21, 1946), and doubtless was thereby rendered impatient. Under such circumstances it clearly behooved the prosecutors not to capitalize on the extreme excitement and prejudice but rather to try to isolate the forum therefrom. A prosecuting official is an officer of the court charged as much with the duty of freeing the innocent as convicting the guilty, and charged always with the duty of according a fair trial. *Mooney* v. *Holohan,* 294 U. S. 103; *Malinski* v. *New York,* 324 U. S. 401.

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[9] There was also seriously prejudicial denial of cross-examination respecting witnesses other than Rosalie Giganti. For example, petitioner was precluded from normal cross-examination respecting the credibility of police officer Charles Buckholtz, the officer to whom petitioner was handcuffed when brought before Rosalie in the hospital (R. 31), and counsel was viciously attacked by the prosecutor for making the attempt to cross-examine (R. 117-118). Again, petitioner was precluded from showing by cross-examination of the witness Giddings the facts surrounding Rosalie's identification, at the examination, of one other than petitioner, the court apparently holding that the best evidence would be the transcript of such examination (R. 118-119). But the court denied admission to such transcript when it was offered (R. 33, 111).

But in sharp contrast to the attitude which should have been displayed by them, the prosecutors here attempted not only to utilize the prejudice and excitement of the community but to enhance and multiply it. Much of their unfair conduct is compactly set forth in detail in petitioner's application for leave to appeal to the Michigan Supreme Court (R. 81-96, 103-105). The prosecutors repeatedly made remarks calculated to convey the impression that petitioner and his counsel were merely wasting time in presenting a defense (R. 83-84, 87, 90, 93, 96); that counsel had done something improper in preparing for trial (R. 82); that he was ignorant of the law and incompetent and the fit object of rude insults and threats by the prosecutors (R. 89, 90, 91, 92, 93; Tr. 1881); that he was unfair (R. 87, 89, 90, 94); that he was adverse to revelation of the true facts (R. 82, 83, 84, 86). Most serious of all, the record bespeaks a calculated design to convey the impression that petitioner's counsel was reprehensible for cross-examining Rosalie (R. 83, 84, 87) and was "crucifying" her, to use the very word of the prosecutor (R. 104). Thus, in a situation presenting the terrible dilemma faced by conscientious counsel charged on the one hand with the protection of a client fallen prey to popular clamor, and motivated on the other hand by deep human sympathy for a child brutally mistreated by someone—a situation wherein the highest duty rested on all public officials to attempt to make possible a fair trial—the prosecutors here not only failed to display that positive attitude necessary to guarantee fairness, but by their flagrant abuse of petitioner's counsel went to the other extreme to a degree that shocks the conscience.

All of the remarks of the prosecuting officials calculated to impress the jury with the notion that petitioner's counsel was merely wasting time, doubtless assumed added significance by reason of the jury's natural impatience consequent upon its confinement for nearly three weeks, including the Easter season. It is submitted that such

conduct clearly prevented a fair trial and denied due process.

The prosecutor's emphatic argument to the jury that the burden was on petitioner to establish his innocence (R. 103), a position contrary to the law of every jurisdiction of this country, which argument was apparently approved at least for the moment by the court (R. 104), denied a fair trial.

(3) **The Attitude of the Trial Court Prevented a Fair Trial.**

The attitude, remarks and conduct of the trial court, as shown by the record, are subject substantially to the criticism directed against the prosecuting officials, and denied petitioner due process by rendering a fair trial impossible.

First it should be noted that under these circumstances of extreme public excitement, tension, and pre-judgment of petitioner, petitioner's motion for a continuance should have been granted (R. 2, 113, 127). A fair trial at the time was probably impossible. The *voir dire* examination of the jurors was carried on in the presence of the entire panel and all of the jurors, including those finally selected, heard the conclusions of twenty-one of their members that petitioner was guilty, including the statement of one juror that "There is no use taking anybody's time, because I feel the man is guilty and I always have." (R. 2, 115-117.) Only a reasonable continuance could have made possible a fair trial.

Secondly it is to be noted that throughout the trial the judge, without justification, sharply reprimanded petitioner's counsel for acts required by professional duty, some of the reprimands having been based on misstatements of fact by the judge, wrongfully implying that counsel was guilty of mistreatment of witnesses and sharp practice (R. 96-103). Further, the judge repeatedly made remarks and evidenced an attitude toward counsel which must have had the effect of conveying to the jury that

counsel was merely wasting everybody's time (R. 96-103), a particularly prejudicial attitude in view of the noted facts concerning extended confinement of the jury extending over the Easter season, and the heinous nature of the offenses charged. And the judge not only failed to restrain the prosecutors' flagrant abuse of petitioner's counsel but for the most part acquiesced in and approved it, at least impliedly (R. 81-96, 103-104; Tr. 1881). It is submitted that the attitude of the court must have conveyed to the jury that counsel was ignorant, or in any event that there was something reprehensible about him, presumably for representing petitioner. No adversary proceeding, such as a criminal trial, can be essentially fair under these circumstances.

(4) The Destruction of the Scientific Evidence by the Detroit Police Department Precluded a Fair Trial.

As has been seen in the Statement, *supra*, p. 11, the Detroit policeman, Albert Langtry, testified that he found blood and seminal fluid on the garments of Rosalie and on articles of clothing connected with petitioner, and blood in certain scrapings taken from the floor and bar on the back door of the market and allegedly from the finger nails of petitioner. He destroyed all the specimens from which he worked, thus precluding all possibility of check. Moreover, the police department failed to type such specimens before destroying them, although typing concededly is not difficult (Tr. 1900). It is thus apparent that the evidence of complete objectivity and greatest intrinsic worth was destroyed before trial.

If, as is clearly establshed, the knowing use by prosecuting officials of false evidence constitutes a denial of due process, *Mooney* v. *Holohan*, 294 U. S. 103; *Hysler* v. *Florida*, 315 U. S. 411, 413, it is submitted that the destruction of evidence probably conclusive, namely, objective scientific evidence, before trial and before op-

portunity of petitioner to examine and appraise it, likewise violates due process. Such is the law.

> "* * * What the appellant really charges is not denial of the right of confrontation as such, but suppression or concealment of evidence or witnesses favorable to him. We may assume that this would be a violation of the due process clause of the Fifth Amendment. Cf. *Mooney* v. *Holohan*, 1935, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406." Mr. Justice (now Mr. Chief Justice) Stephens, speakin for the court in *Curtis* v. *Rives*, 123 F. (2d) 936, 938 (App. D. C.).

In *Hicks* v. *Hiatt*, 64 F. Supp. 238 (D. C. Pa.), petitioner, who had been convicted of rape by Army court martial, was discharged on habeas corpus because "the procedures of the military law were not applied to Hicks in a fundamentally fair way" (p. 250). Petitioner claimed that, because of improper investigative procedure, he was precluded from showing that the prosecutrix was a woman of ill repute as to chastity. The court said:

> "The petitioner has testified that he requested his counsel at the court-martial to summon as witnesses three persons who, he insists, would have testified as to Mrs. Murray's reputation for lack of chastity. * * * The respondent has produced no evidence to controvert Hicks' statement that he made this request and I accept it as correct. Hicks' counsel should have called the persons named as witnesses. * * * It is sufficient to state here that even if the error of Hicks' counsel in not calling the persons named as witnesses, may be attributed properly to him this did not relieve the court itself from making inquiry into Mrs. Murray's reputation for chastity in Corby and seeing to it that evidence was offered on this issue.
>
> "Moreover, it must be assumed that the report of the pretrial investigation was in the hands of the trial judge advocate. I do not imply that that officer was guilty of conscious suppression of evidence favorable to the accused for I do not believe that to have been the case. The trial judge advocate had the duty, as

does any prosecutor, to see that Hicks was dealt with fairly. * * * Under the circumstances of the case at bar the conclusion is unavoidable that the trial judge advocate negligently failed to reveal the whole truth to the court martial." (pp. 245-246).

In this case, the most charitable construction possible as to why the police destroyed the scientific evidence, is that such destruction was negligent. (The excuse given was that there was no room to keep it (Tr. 1765)). Even so, such destruction denied due process.

The uniquely prejudicial effect of such destruction in this case is apparent from the fact that what scientific evidence was left for analysis by a recognized expert strongly tends to show the innocence of this petitioner. Thus, Dr. Frisch was unable to establish the presence of the B factor—Rosalie's blood type—in the blood stains on petitioner's garments (although he readily demonstrated the B factor in specimens of blood taken from Rosalie's garments (Tr. 2369, 2370-2371, 2385)), and definitely established that the blood on the white clerk's coat in the market was not Rosalie's blood (R. 46-47; Tr. 2368-2371, 2405). Since in the People's theory the blood on such clerk's coast was the same as that on petitioner's clothing—namely, Rosalie's blood (R. 43)—it would certainly appear that, had the Michigan Supreme Court here permitted appeal, it would necessarily have reversed on the grounds that guilt had not been proved beyond a reasonable doubt. In any event, it was the destruction of the specimens without typing by the Detroit police that precluded the possibility of establishing that the blood on petitioner's clothing was not Rosalie's blood with the same certainty that such fact was established in respect of the blood on the white clerk's coat.

The only seminal stain available for Dr. Frisch's analysis was that taken from Rosalie's pubic area at the hospital (R. 47). All the other alleged seminal specimens from Rosalie's garments had been destroyed by the police

without typing (R. 42)—destruction which, by preventing petitioner from typing the specimens and showing they were not his type, was, whether deliberate or negligent, clearly preclusive of a fair trial.

Moreover, the failure of the police authorities to type the seminal fluid specimen taken from Rosalie's pubic area, during the time when such typing probably could have been accomplished with scientific certainty, amounted in practical effect to destruction of that evidence analagous to the actual physical destruction of the other evidence. The extreme prejudice resulting from this failure is emphasized by the fact that, so far as scientific analysis was possible at the time Dr. Frisch was permitted to examine the slide containing such seminal fluid, the conclusion reached by him indicates that the seminal fluid was not of the type of petitioner's seminal fluid and hence could not have been petitioner's (R. 46-47).

Further, the destruction of the specimens taken from scrapings of the floor and of the bar on the back door of the market, and alleged specimens from the finger nails of petitioner, precluded ascertainment of whether or not such specimens in fact contained human blood (R. 47-50). Clearly, the tests run by Albert Langtry, the Detroit policeman, before such destruction were not adequate to establish human blood.

In summary, therefore, this case presents a situation where the objective evidence of science, so far as the same is available, strongly tends to establish the innocence of petitioner and where, by virtue of destruction of specimens by police officials before trial, petitioner has been precluded from utilizing the full probative significance of the scientific evidence. If the destroyed evidence were available and were in accord, as presumably it would be, with the undestroyed evidence, the former would conclusively establish petitioner's innocence. It is submitted that the destruction has resulted in denial of due process.

(5) Petitioner Was Denied Due Process by Michigan's Failure to Protect Against, Judicially Inquire Into, and Correct Improper Influences Which Gravely Contaminated the Jury Trial, Resulting in a Tribunal Essentially Unfair.

During the course of the trial a Detroit newspaper published with extreme sensationalism a false report that petitioner had confessed guilt (R. 18-20), which in fact he never did, having continuously and steadfastly maintained his complete innocence (R. 32, 35, 36, 72-73, 125). This newspaper story was prominently hawked about the streets of Detroit by newsboys under circumstances indicating that quite likely the jury had heard the statement in passing to and from the place where it was lodged and fed and the court house (R. 18-20, 27-28, 106-108; Tr., affidavit on motion for new trial). Counsel called these facts to the attention of the court, pointing out the great likelihood that members of the jury had heard the false statement and the extreme prejudice which would result therefrom. Counsel requested that the officials in charge of the jury be interrogated fully to ascertain whether the jury had heard the misstatement (R. 19, 28, 107). The court denied this request. The court, however, did put to the jury a general question as to whether they had heard or read anything that would prejudice them, and one juror responded, answering in the negative (R. 108). Obviously the only really satisfactory way of ascertaining the fact would have been by interrogation of the officials in charge of the jury, because questioning of the jury was restricted by the necessity of not conveying to the jury the very information which was the subject of the inquiry.

There was not even an attempt by the court to cure the grave contamination inherent in the procurement by the police matron in charge of the confined jury of a valuable favor to each member thereof. Thus, petitioner's counsel called to the attention of the court during trial that a newspaper story set forth that such police

matron had procured for each woman member of the jury, and for each male member thereof for the wife of such member, nylon stockings (R. 60-61, 108-111). This was at a time when nylon stockings had great value to women and when queues of women would line up in metropolitan areas, sometimes for blocks long, and wait for hours to procure nylon stockings (R. 109). Counsel called these facts to the attention of the court and asked the court to ascertain the full relevant facts (R. 111). The court refused to make official inquiry or to permit counsel for petitioner to make any inquiry concerning this incident (R. 108-111). The court said that it had privately inquired and had ascertained that each member of the jury paid for his or her nylon stockings thus procured (R. 110, 111). Counsel pointed out that the vice of the incident would consist not only in the payment for the stockings by a public official but in the procurement under such circumstances of a rare and highly valued commodity for members of a jury (R. 110). Counsel's motion for a mistrial was denied and the following then took place:

> "Mr. Fitzpatrick: May I ask this question further, may I ask your Honor if my request for a full and frank determination of the question from the stand and on the record in this case is also denied?
>
> The Court: Yes, I have investigated that feature of it.
>
> Mr. Fitzpatrick: What is the fact, if your Honor knows, as to who procured them?
>
> The Court: I don't know who procured them but they paid for them.
>
> Mr. Fitzpatrick: Does your Honor feel, in order to be fair, does your Honor not think we ought to at least determine that on the record right here and now?
>
> The Court: No, no. Bring in the jury." (R. 111).

Here there was a clear two-fold denial of due process:

(1) The rendering of such a favor by a police official to the jury destroyed the impartiality of the tribunal.

"* * * Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Tumey* v. *Ohio,* 273 U. S. 510, 532.

"* * * If it is made to appear that a jury sworn to try a case is subjected or exposed to any matter or thing which might tend to prejudice or influence their consideration of the case, or if the behavior of any member thereof is unbecoming to a gentleman of the jury, a presumption arises against impartiality and that presumption can only be rebutted by a clear and positive showing that such matter, thing, or behavior did not influence their verdict." *Baker* v. *Hudspeth,* 129 F. (2d) 779, 782 (C. C. A. 10th), cert. denied 317 U. S. 681, 711, 318 U. S. 800.

"* * * The only safe rule must be to treat the jury as disqualified to settle the rights of litigants as soon as they cease to be guarded against unlawful contact from the outside world." *Churchill* v. *Alpena Circuit Judge,* 56 Mich. 536, 540.

(2) The refusal of the trial court to permit judicial inquiry into the surrounding facts and circumstances, and his reliance exclusively on his private, personal investigation, denied a fair tral. *In Re Oliver,* 68 Sup. Ct. 499 (March 8, 1948); *Chambers* v. *Florida,* 309 U. S. 227, 236-238.

(6) The Supreme Court of Michigan Denied Equal Protection of the Laws in Refusing to Grant Appeal.

While it is true that due process of law apparently does not require that a state generally afford appeal in criminal cases, it is equally true that no state which has integrated appeal into its legal processes can arbitrarily withhold it from a particular defendant or discriminatively curtail it. *Cockran* v. *Kansas,* 316 U. S. 255; cf. *Boykin* v. *Huff,* 121 F. (2d) 865, 872 (App. D. C.).

It is submitted that in a case such as this where there was no tribunal other than the Michigan Supreme Court which could permit appeal and thus extricate petitioner from an essentially unfair proceeding, such court was bound to permit appeal. This situation should not be analogized to the certiorari jurisdiction of this Court in federal cases. Between this Court and an unfair trial in a district court of the United States stand the circuit courts of appeals. But in Michigan there is no tribunal to which a defendant may appeal, however unfair his trial, save the Michigan Supreme Court. Michigan having granted the absolute right of appeal in civil cases where the amount in controversy exceeds five hundred dollars, and it being presumed that the Michigan Supreme Court under its discretionary jurisdiction [10] normally grants appeal in a criminal case where the trial is essentially unfair, since it is always presumed in the absence of a contrary showing that the laws of a state are properly administered, *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 190, it is submitted that by here denying appeal and thus refusing to correct essentially unfair judicial proceedings, Michigan has denied equal protection of the laws.

In a case such as this where no appeal has been permitted by the state, the tasks imposed on counsel to demonstrate, within the limits of a concise petition for certiorari, and on this Court to perceive essential unfairness, are onerous. But they must be undertaken if the Constitution is to be obeyed. Where a state's act in violation of due process is easily isolated and categorized, it almost condemns itself. It is a situation such as presented by this

[10] Michigan Supreme Court Rules, No. 60; Mich. Stat. Ann. Sec. 27.2591, Sec. 28.1100.

case—a lengthy, complex record without benefit of a memorandum by the trial court or consideration by a state appellate tribunal—which indeed calls for a scrupulous and independent review. Cf. *Avery* v. *Alabama,* 308 U. S. 444, 447; *Oyama v. California,* 68 Sup. Ct. 269, 270 (January 19, 1948). Only the granting of certiorari can permit that adequate presentation necessary to conclusive establishment of serious violation of constitutional protection. It is sincerely urged that the writs issue, that the full facts may be examined and the essential unfairness made manifest.

CONCLUSION.

Wherefore, it is respectfully requested that these petitions for writs of certiorari to the Michigan Supreme Court and the Recorder's Court for the City of Detroit, Michigan, be granted.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1948.

Nos. 103, 104.

FRANK LOBAIDO, *Petitioner,*

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

On Petitions for Writs of Certiorari to the Supreme Court of the State of Michigan and the Recorder's Court for the City of Detroit, Michigan.

PETITIONER'S REPLY BRIEF.

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v.

THE PEOPLE OF THE STATE OF MICHIGAN.

On Petitions for Writs of Certiorari to the Supreme Court of the State of Michigan and the Recorder's Court for the City of Detroit, Michigan.

PETITIONER'S REPLY BRIEF.

In Reply to Respondent's Point One.

Respondent contends that the petitions for certiorari herein come too late, arguing that the three-months' period in which to apply for certiorari commenced to run from January 13, 1948, the date the Michigan Supreme Court entered its order denying application for leave to appeal (R. 124), rather than February 17, 1948, the date that court

entered its order denying petitioner's motion for reconsideration (R. 129-130). Hence, so the argument runs, the order of a Justice of this Court dated May 10, 1948, extending until June 17, 1948, the time for petitioning for certiorari (R. 131), is ineffective (Respondent's Opposing Brief, pp. 8-13). Brief consideration of the precise action of the Michigan Supreme Court, and of controlling authorities of this Court, will show respondent's contention wholly groundless.[1]

Respondent's contention assumes that the Michigan Supreme Court did not entertain petitioner's motion for reconsideration or decide it on the merits, and respondent refers only to the Michigan Supreme Court's docket entry of denial of such motion (R. 123; Respondent's Opposing Brief, p. 3). But the order denying such motion is in the record and on its face shows that the court entertained and decided the motion. We quote such order *verbatim:*

"IN SUPREME COURT OF MICHIGAN

[Title omitted]

ORDER DENYING MOTION FOR RECONSIDERATION—FILED FEBRUARY 17, 1948

In this cause a motion is filed by defendant for a reconsideration of the order heretofore entered herein on January 13, 1948, denying defendant's application for leave to appeal from the sentence of the Recorder's Court of the City of Detroit, and a brief in opposition thereto having been filed by plaintiff, and due consid-

[1] Candor compels us to state that this contention is sheer afterthought. When petitioner's motion for reconsideration was before the Michigan Supreme Court, the People submitted a detailed brief arguing the merits of such motion, but saying not one word against the jurisdiction of the Michigan Supreme Court to entertain the motion. Motions for reconsideration, such as that of petitioner herein decided February 17, 1948, are well recognized in Michigan practice, frequently being made, entertained and decided on the merits following denial of application for leave to appeal in criminal cases. Such motions are not reported.

eration thereof having been had by the Court, It is ordered that the order heretofore entered herein on January 13, 1948, as aforesaid, be and the same is hereby affirmed." (R. 129-130.)

From the face of the above order it conclusively appears that the Michigan Supreme Court entertained and considered petitioner's motion for reconsideration and on February 17, 1948, decided such motion on the merits. It will be noted that such order even recites that the People filed a brief in opposition to the motion. That brief, which argued in detail the merits of such motion, did not so much as suggest or hint at an argument against the jurisdiction of the Michigan Supreme Court to entertain the motion. It will also be noted that said order of February 17, 1948, "hereby affirmed" the order of January 13, 1948. Under these circumstances it is conclusively settled that the time in which to apply for certiorari commenced to run from February 17, 1948.

Texas Pac. Ry. Co. v. *Murphy*, 111 U. S. 488.
Chicago Great Western R. Co. v. *Basham*, 249 U. S. 164.
Citizens' Bank of Michigan City, Ind. v. *Opperman*, 249 U. S. 448.

See also:

Brockett v. *Brockett*, 43 U. S. 238.
Aspen Mining & Smelting Co. v. *Billings*, 150 U. S. 31.

In *Texas Pac. Ry. Co.* v. *Murphy, supra*, the Texas Supreme Court's judgment of affirmance was entered May 29, 1883, and its order denying a motion for rehearing was entered December 21, 1883. Such order was substantially identical with the Michigan Supreme Court's order here involved. This Court held that the time in which to sue out a writ of error ran from December 21, 1883, and not May 29, 1883, because, although the record did not show when

the motion for rehearing had been made, such motion was *entertained* by the Texas Supreme Court and *decided on its merits.* This Court said:

> "In *Brockett* v. *Brockett,* 2 How. 238, it was decided that a petition for rehearing, presented in due season and entertained by the court, prevented the original judgment from taking effect as a final judgment, for the purposes of an appeal or writ of error, until the petition was disposed of. This record does not show in express terms when the motion for a rehearing was made, but it was entertained by the court and decided on its merits. The presumption is, therefore, in the absence of anything to the contrary, that it was filed in time to give the court control of the judgment which had been entered, and jurisdiction to enforce any order that might be made. This presumption has not been overcome." (p. 489.)

In *Chicago Great Western R. Co.* v. *Basham, supra,* this Court said:

> "Section 237, Judicial Code, both before and since the amendment of September 6, 1916, permits of the review by this court only of the final judgment or decree of the highest state court in which a decision in the suit could be had. It is only a judgment marking the conclusion of the course of litigation in the courts of the state that is subjected to our review. Hence, whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the state court of last resort through the medium of a petition for rehearing, and such a petition is presented to and entertained and considered by that court, we must take it that by the practice prevailing in the state the litigation is not brought to a conclusion until this petition is disposed of, and until then the judgment previously rendered cannot be regarded as a final judgment within the meaning of the act of Congress." (pp. 166-167.)

In *Citizens' Bank of Michigan City, Ind.* v. *Opperman, supra,* this Court said:

> "* * * Where a petition for rehearing is entertained, the judgment does not become final for purposes of our review until such petition has been denied or otherwise disposed of, and the three months' limitation begins to run from date of such denial or other disposition." (p. 450.)

The Michigan Supreme Court having entertained, considered and decided on the merits petitioner's motion for reconsideration, as conclusively appears from its order of February 17, 1948, the matter is ended for this Court, whose functions do not include a critique of the rationale of state practice and procedure. However, it may be noted, *passim*, that clear authority for the Michigan Supreme Court's entertainment of the motion for reconsideration and decision thereof on the merits, appears in its Rule 72, "Miscellaneous Relief Obtainable In Supreme Court",[2] Section 1, subparagraph (g), which provides that such court may, at any time, in its discretion and on such terms as it deems just, "Give any judgment and make an order which ought to have been given or made, and make such other and further orders and grant such relief, whether mentioned in the notice of appeal or not, as the case may require;" (Michigan Court Rules, Rule 72, Section 1 (g)).[3]

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[2] The Michigan Supreme Court by constitutional provision and statute has clear authority to prescribe its rules. Michigan Constitution, 1908, Art. VII, Section 5; Mich. Stat. Ann., Secs. 27.34, 27.44, 27.111.

[3] Respondent correctly states that petitioner's motion for reconsideration does not fall within Rule 71, Section 4, of the Michigan Court Rules. This is true beyond question; Section 4 on its face applies only to applications for rehearing after the Michigan Supreme Court has heard an appeal, decided the case, and filed its opinion (see Respondent's Opposing Brief, p. 11). Here, leave to appeal was denied and no opinion ever filed (R. 124), and clearly said Section 4, with its requirement that applications for rehearing be filed within twenty days from the filing of the opinion, is wholly inapplicable. This need not be labored; respondent expressly concedes such inapplicability (Respondent's Opposing Brief, p. 12).

In Reply to Respondent's Points Two and Three.

We respectfully submit that the generalities advanced in Respondent's Opposing Brief—not every error committed by a trial court is a denial of due process (p. 14); the trial judge has wide discretion in the conduct of a criminal trial (pp. 16, 20); credibility of expert witnesses is for the jury (p. 22)—do not answer the showing, documented in the petitions herein, of essential unfairness. Nor does respondent's choice not "to enter into a lengthy discussion or analysis of the facts, for these, after all, were for the jury" (p. 7) nor its disinclination to consider because "too trivial" the grave contamination inherent in the "nylon stocking episode" (p. 22), avail to dissuade from scrupulous review of the documented claims of denial of constitutional right, for where such denial is asserted, this Court will of its own responsibility appraise and analyze the facts.

Norris v. *Alabama*, 294 U. S. 587, 590.
Chambers v. *Florida*, 309 U. S. 227, 229.
Smith v. *Texas*, 311 U. S. 128, 130.

Even if it be true, as stated in Respondent's Opposing Brief, p. 24, that "the trial court in its proceedings was guided solely by well-established Michigan law, both statutory and judicially declared", this will not avail respondent against the showing in this case of violation of the Fourteenth Amendment. The Michigan courts should also have been guided by the federal constitutional guarantee of essential fairness in judicial proceedings.

Conclusion.

The contention that the petitions for certiorari herein were filed too late is groundless. It is respectfully submitted that such petitions should be granted, that the serious constitutional violations presented in them may be conclusively shown to this Court.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1948

Nos. 103, 104

FRANK LOBAIDO, Petitioner

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

On application for certiorari to the Supreme Court of the State of Michigan.

Brief opposing Petition for Certiorari

I

Opinions of Courts Below.

We accept counsel's statement in relation to the opinions of the courts below.

II

Counter-Statement on Jurisdiction.[1]

1. It is our position that the Court lacks jurisdiction because the petitioner did not make application for a writ of certiorari within 3 months after the entry of the judgment of the recorder's court of the city of Detroit (the trial court), or within 3 months after the entry of the final order of the Supreme Court of the State of Michigan (the appellate court); nor did he apply for an extension of such time, nor did a Justice of the Court grant an extension within such time. 28 U.S.C. § 350.

The following jurisdictional steps of procedure were taken in the trial court and in the Supreme Court of the State:

May 1, 1946, after the jury had found petitioner guilty (2) of the two offenses charged in the information,[2] the trial court imposed sentence (2).

May 17, 1946, the petitioner filed a motion for new trial on substantially the same grounds as those presented in his application for leave to appeal (2).[3]

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[1] Numbers in parentheses, unless otherwise indicated, refer to pages of the printed record; numbers preceded by 'Tr.' refer to pages of the typewritten transcript; numbers preceded by 'P' refer to the petition for certiorari.

[2] The rape of a 7-year-old girl, and, contemporaneously, an assault upon her, by slitting her throat, with intent to murder.

[3] This motion for new trial was filed within the time limit prescribed by Michigan Law. Mich. Code of Criminal Procedure, chap. 10, § 2 (3 Comp. Laws Mich. 1929, § 17356; Mich. Stat. Ann. § 28.1099).

Dec. 24, 1946, the trial judge denied the foregoing motion.

Oct. 9, 1947, petitioner filed (122) in the state supreme court his application for leave to appeal (80-122), based on a concise statement of facts and proceedings (1-61) certified (80) by the trial judge.[4]

Jan. 13, 1948, the State Supreme Court denied (123) petitioner's application for leave to appeal.[5]

Feb. 10, 1948, counsel for petitioner filed (123) with the clerk of the State Supreme Court a document styled 'Motion for Reconsideration of Order denying application for Leave to Appeal'.[6]

Feb. 17, 1948, the Supreme Court of Michigan denied (123) such motion for reconsideration, without opinion, and entered in its journal an order to that effect.

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[4]

Mich. Court Rule 60. Cf. Mich. Code of Criminal procedure, chap. 10, §4 (3 Comp. Laws Mich. 1929, § 17358; Mich. Stat. Ann. § 28.1101).

[5]

We should state at once our contention that when the court immediately below denied petitioner's application for leave to appeal on the 13th day of January, 1948, its order became the final judgment of that court within the meaning of 28 U.S.C. § 350, and that the prescriptive period of 3 months within which petition for certiorari might be filed in this Court began to run on that date.

[6]

There is, so far as we can ascertain, no constitutional, statutory, or inherent power to grant such a motion. And, if it applies, Court Rule 71 (Michigan) provides that applications for rehearing must be made within 20 days from the filing of the opinion. Here, the petitioner waited 28 days before applying for reconsideration.

The following procedural steps were taken in this Court:

May 10, 1948, upon order of Mr. Associate Justice Reed, and upon consideration of the application of counsel for petitioner, the time for filing petition for writ of certiorari in this cause was extended to the 17th day of June, 1948; and such a petition was filed within that time limit.[7]

2. It is further our position that no federal questions of substance are presented by the petition for certiorari, and that all questions presented to the trial court and to the Michigan supreme court were decided on adequate and independent nonfederal grounds. And, since this Court possesses no supervisory authority over the courts of the State of Michigan, jurisdiction in this cause is lacking.

III

Questions Presented

First: Was the petition in this cause filed within the period of time prescribed by law?[8]

Second: Does the petition present federal questions of substance:

(a) Is there any merit to petitioner's claim that substantial denial of cross-examination prevented a fair trial?[9]

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[7]
It is our position that the order extending time was entered after the time period had already expired.

[8]
28 U.S.C. § 350.

[9]
Petition for certiorari, pp. 18-21.

(b) Or to his contention that the conduct of the prosecuting officials prevented a fair trial?[10]

(c) Or that the attitude of the trial court prevented a fair trial?[11]

(d) Or that the destruction of the scientific evidence by the Detroit police department precluded a fair trial?[12]

(e) Or that petitioner was denied due process by Michigan's failure to protect against, judicially inquire into, and correct alleged improper influences which are claimed to have 'gravely contaminated the jury trial, resulting in a tribunal essentially unfair'?[13]

(f) Or that the Supreme Court of Michigan denied equal protection of the laws in refusing to grant appeal?[14]

Third: Were the questions now presented in their federal aspect, decided by the courts below on adequate and independent nonfederal grounds?

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[10] Petition for certiorari, pp. 21-23.

[11] Petition for certiorari, pp. 23-24.

[12] Petition for certiorari, pp. 23-24.

[13] Petition for certiorari, pp. 24-27.

[14] Petition for certiorari, pp. 28-30.

IV

Counter-Statement of the Case.

Counsel's statement of proceedings is substantially correct except that he refers to the 'Concise Statement of Facts and Proceedings' upon which petitioner under Michigan Court Rule 60, Sec. 2, applied to the court below for leave to appeal, as 'so-called'. Since the statement was certified (79-80) by the trial judge, although it may be lengthy, it is authentic and cannot be impeached.[14a]

We accept, for the present purpose, counsel's statement of the facts, although we deem it necessary to correct a few inaccuracies and omissions (Supreme Court Rule 27, par. 4):[14b]

1. It is said, petition, p. 7, that the horrible nature of the crime aroused public indignation to a point probably unequalled in the history of Detroit; that from January 27, 1946, until commencement of the trial on April 8, 1946, and throughout the trial which terminated on April 25, 1946, the case received newspaper and public attention to an ex-

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[14a]

Under Michigan practice (Rule 60), after a lengthy trial hotly contested by competent and capable defense counsel, reported in a transcript covering over 2600 typewritten pages, it is not surprising that opposing counsel on each side of the controversy would find difficulty in preparing and accepting a concise statement agreeable to the prosecution and the defense. Especially when, as here, a new prosecutor has come into office a few days after denial of the motion for new trial.

[14b]

Our position is, of course, that all questions of fact and the credibility of the witnesses, as well as the value of certain segments of the testimony referred to in counsel's statement, were exclusively for the jury.

tent unique in the annals of Michigan jurisprudence (126). Such a statement is merely a substantial quotation from paragraph 5 of petitioner's motion for reconsideration of the order denying leave to appeal. The extent of the publicity involved in this case does not appear of record. If it does then it must appear in the motion for continuance, a copy of which has not been served on the solicitor general.[14c]

2. In footnote 3, petition, p. 8, counsel refers to a statement said to have been made by petitioner to the prosecutor 'after the second consecutive night without sleep' (34, 35; Tr. 2115).

It should be added, we respectfully suggest, that since petitioner claims no denial of due process because of the use of a confession or extra-judicial statement taken under coercion, this statement should be disregarded.

3. On page 14 of the petition, counsel states that 'it therefore seems reasonably clear that taking the scientific evidence together it establishes' certain facts set forth by him. This, we submit, is merely argumentative. Analysis of the facts was for the jury under proper instructions from the bench.[14d]

[14c]

A copy of the motion for continuance is not included in the printed record. We consented to the granting of petitioner's motion to dispense with printing of the record of the trial court (1-2), and petitioner's counsel was considerate in supplying us with a copy of the transcript of trial (2643 pages), but there is not available for us at the present time a copy of the motion for continuance.

[14d]

We do not choose at this time to enter into a lengthy discussion or analysis of the facts, for these, after all, were for the jury.

V

The Argument

Point One

The petition in this cause was not filed within the period of time prescribed by federal law.

The Congress has provided, that no writ of certiorari intended to bring any judgment or decree before this Court

> "shall be allowed . . . unless application therefor be duly made within three months after the entry of such (final) judgment. . . . For good cause shown either of such periods for applying for a writ of certiorari may be extended not exceeding sixty days by a justice of the Supreme Court."[15]

If petitioner's application is for a review of the final judgment of the court of original jurisdiction, *i.e.*, the sentence imposed upon him, then such judgment was entered on the 1st day of May 1946. Under decisions of this Court, presently cited, the finality of that judgment was suspended from time to time: (1st) by a *timely* motion for new trial filed (2) on the 17th day of May 1946 and denied (2) on the 24th day of December 1946; (2nd) by a *timely* application for leave to appeal (80-122) filed (122) in the Michigan Supreme Court on the 9th day of October 1947,[16] and denied (124) on the 13th day of January 1948.

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[15] 28 U.S. C. § 350.

[16] Although the record does not disclose the fact, we are assuming for the present that the concise statement of facts and procedure required by Michigan Court Rule 60, was prepared, served and filed within the time therein prescribed.

It is our position that, under the laws of the State of Michigan, which this Court will recognize and honor, the judgment of the trial court became final on the 13th day of January 1948 when the highest court of the state denied appeal; that the 3-month period of time prescribed in § 350, Title 28, U.S.C., as amended, therefore expired on the 13th day of April 1948; that, under the laws of Michigan, presently considered, the motion for reconsideration of the denial of leave to appeal, filed (123) in the State Supreme Court on the 10th day of February 1948, was unauthorized and did not operate to suspend the final judgment of the trial court, or to toll the federal law; and that therefore the order of this Court, entered May 10, 1948, extending the time for filing petition for certiorari (131) to June 17, 1948, was made after the Court had lost jurisdiction.

If petitioner replies that the Supreme Court of Michigan, in denying (129) his motion for reconsideration of the order of January 13, 1948, did not decide the question of power and authority to entertain such a motion, we respectfully suggest that the court below should first be given opportunity to do so before this Court makes final disposition of the pending application for certiorari.

1. In Michigan, the right to appeal from a conviction in criminal proceedings, is purely statutory and does not exist in the absence of a statute,[17] 'and review for error, not raised in accordance with the statute and rules of practice is not a right of the defendant, although such a review may be, but seldom is, granted in the discretion of the su-

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[17]

Gillespie, Mich. Criminal Law & Procedure, Vol. I, § 641, p. 759, citing: People v. Yund, 163 Mich. 504; Crary v. Judge, 197 Mich. 452; People v. Price, 244 Mich. 643; Att'y Gen'l v. Lane, 259 Mich. 283, 287 U.S. 654.

preme court'.[18] While the right of review is statutory, the procedure is subject to court rules,[19] and the legislature has declared that the practice established by court rules for the exercise of appellate jurisdiction, shall prevail over the statutes.[20]

Michigan Court Rule 60 (1945), therefore, controls. Section 2 thereof provides in substance that to obtain leave to appeal to the Supreme Court, the appellant shall within the time limited for taking an appeal as of right (except when delayed appeal is sought),[21] (a) prepare an application for leave to appeal in accordance with the provisions of the rule (unnecessary to be recited here); (b) serve copy thereof on the opposite party with notice of prompt settlement of the concise statement on which the application is based; (c) that objections to the proposed concise statement shall be settled by the judge; (d) file with the supreme court; (e) file a supporting brief.

Section 3 (a) thereof provides as follows:

"(a) In cases where timely appeal requires leave, application for *delayed* (emphasis ours) appeal shall be

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[18]

Id., Vol. I, § 641, p. 760, citing People v. Yund, supra.

[19]

Id., Vol. I, § 642, p. 760, citing Att'y Gen'l v. Lane, supra.

[20]

Mich. Code of Criminal Procedure, chap. 10, § 14 (3 Comp. Laws 1929, § 17368; Mich. Stat. Ann. § 28.1111); In re Widening of Woodward Avenue, 265 Mich. 87.

[21]

An appeal of right shall be taken within 20 days after filing proof of service on opposing counsel of notice of entry of judgment, or within 20 days after entry of order denying new trial. Mich. Court Rule 57, § 1.

made as above provided and, in addition, shall affirmatively show, by affidavit of facts, that the delay was not due to appellant's culpable negligence. Any party may file affidavits in opposition thereto".

Once such an appeal has been denied by the supreme court, there is no provision by rule or otherwise, so far as we have been able to find, for a motion to reconsider the order of denial or the application for leave to appeal.

2. Court Rule 71, of course, establishes the procedure for an application for rehearing in the supreme court; but that rule applies only to calendar causes submitted to and decided by the court on their merits; and it is very strict in prescribing the time within which such motions may be filed:

> "Sec. 4 (Rule 71): No application for rehearing will be considered by the Court unless the moving party shall, within 20 days from the filing of the opinion therein, cause any papers upon which it is based, together with his reasons for granting the same, to be printed, and 24 copies thereof to be filed with the clerk of this Court, and a copy thereof to be served upon the counsel for the opposite party. Proof of this service shall also be filed with the clerk. The party opposing may, within 10 days thereafter, file with the clerk 24 copies of his objections to the application, either printed or typewritten, as he may prefer; the Court will then examine the papers, and without further argument, unless specially ordered, will pass upon the application".

Petitioner was denied leave to appeal, on the 13th day of January 1948, and he filed his motion for reconsideration on the 10th day of February 1948. Twenty-eight days

elapsed. Hence, under Rule 71, § 4, *supra*, he was just 8 days too late, assuming that the rule permits such a motion to be filed at all.

But the rule does *not* apply to applications for leave to appeal, and it is manifest that under Michigan law the judgment became final on the 13th day of January.

We realize, of course, this Court has held that a **'timely'** petition for rehearing tolls the running of the three months' period within which a petition for certiorari to state courts may be presented to this court, because it operates to suspend the finality of the state court's judgment pending such court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties;[22] that a motion for a new trial, *seasonably* made, suspends the running of such time; but in the absence of any such motion or of some proceeding of which the court has jurisdiction, and *seasonably* filed, the Court is powerless, after the period within which an appeal can be applied for, to extend the time fixed.[23]

Although we must concede there are few opinions on the subject, and although there seems to be some thought to the contrary,[24] reason and common sense require that in circumstances such as these the three-month prescriptive period should not be considered to have been tolled or sus-

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[22]

Department of State Banking, State of Nebraska, v. Pink, 317 U.S. 264; rehearing denied, 318 U.S. 802.

[23]

Chicago etc. R. Co. v. United States, 54 Ct. Cl. 116.

[24]

See, e.g., United States v. Seminole Nation, 299 U.S. 417.

pended when the petitioner filed his motion for reconsideration of the order denying appeal. Unless the rule is rigidly enforced, a litigant could prolong the time within which he may apply for a writ of certiorari from this Court, an indefinite number of days or years by moving the state court to reconsider its final judgment or order.

We, therefore, respectfully submit that the petition in this cause was not filed within the period of time prescribed by § 350 of Title 28 of the U.S.C., and that this Court is without jurisdiction.

Point Two

The petition for writ of certiorari does not present substantial federal questions.

We respectfully submit that the petitioner's several claims of denial of due process, lack merit or substance. This is merely one of those cases in which an accused person has been tried by jury in a state court of competent jurisdiction, with the aid and assistance of highly competent and experienced counsel possessing marked ability, and has been convicted of a heinous offense.[25] The trial judge gave due consideration (for seven months) to petitioner's motion for new trial; and the highest court of the State, after carefully considering the defendant's numerous as-

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[25]

Two offenses arising out of the same criminal transaction, viz., statutory rape, and assault with intent to commit murder, were charged in the information (1-2), and the jury found petitioner guilty of each. No point is made here that the two counts were multifarious or inconsistent, although it was raised below.

signments of error,[26] denied him an appeal. Although he clothed many of these assignments in language indicating a claim of denial of due process, we respectfully submit that the questions raised could be decided on nonfederal grounds.

In short, what counsel in his commendable zeal is attempting to do is to persuade this Court to take upon itself the task and the duty of supervising state courts in the conduct of criminal proceedings, for if he is correct in supposing that a writ of certiorari should issue in a case such as this, then we would have to admit that state courts are incompetent to deal with such situations; and that every error committed by a trial court is a denial of due process. This Court, we believe, would be most reluctant to take such a position.

It is our position, therefore, that the several questions here presented for consideration as federal problems, may be somewhat summarily treated:

(a) Is there any merit to the claim that a substantial denial of cross-examination prevented a fair trial?

Counsel argue, petition, pp. 18-21, that since the petitioner was convicted largely through the testimony of the victim, a girl 7 years of age, subject to the vivid imagination of a child of her years, since her testimony indicates a brilliant mentality 'which, in a child of seven years, enhances the dangers of imagination and fancy', and since there were many inconsistencies in her testimony, it was essential to a fair trial that petitioner be allowed the widest scope of

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[26]

Such assignments, approximately 65, cover 42 pages of the printed record (80-122).

cross-examination. 'Without it', counsel urges, 'a judicial proceeding could be nothing but pretense', p. 19. Then, having cited several examples, he contends that substantial denial of cross-examination prevented a fair trial. No cases are cited, except *United States v. Keown*, 19 F. Supp. 639, a district court decision which merely stated the common-law rule that 'every accused person has the right to cross examine on material facts every witness who testifies against him', a rule constituting a part of due process.

1. It is doubtful to us whether this question was clearly and plainly raised in its federal aspect in the courts below. Counsel's 9th assignment of error in his application for leave to appeal, reads:

> "Because the court erred in limiting the defense counsel's cross-examination of the prosecutrix, on April 17th, 1946, . . . on the theory that said cross-examination was repetitious, whereas counsel was merely laying the ground work for impeachment, and so advised the court" (112).

There is definitely no claim here (as in other such assignments) that such an error was in contravention of the defendant's constitutional right to a fair and impartial trial, or to due process of law.

2. Under the laws of the State of Michigan it is the duty of the judge

> "to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved".[27]

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[27] Mich. Code of Criminal Procedure, chap. 8, § 29 (Mich. Comp. Laws 1929, § 17322; Mich. Stat. Ann. § 28.1052).

The supreme court of that State has held repeatedly that the trial judge is necessarily vested with considerable discretion in the reception of testimony, and that the scope of cross-examination is also within his sound discretion, *People v. Hoffman*, 142 Mich. 531.

Where the defense is conflicting, and it is manifest that certain witnesses on one side or the other have testified falsely, the manner of examination of witnesses and the general conduct of the trial must necessarily be left to the discretion of the trial judge.[28]

As a recognized authority on Michigan criminal procedure has well said:[29]

> " . . . The trial judge is not a mere figurehead. He is charged with directing important public business. The atmosphere of the trial court cannot be carried into the appellate court, nor can the conditions which move the trial judge be displayed in the printed record".

It is here complained that the trial court denied due process when he refused to allow counsel for the defense to repeat certain questions asked a 7 year old girl. Of such a general situation it has been stated:[30]

> "The court has the right to go to some lengths where there is a continual repetition of questions, to compel

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[28]
Gillespie, I Michigan Criminal Law and Procedure, § 465, p. 574, citing People v. Hoek, 169 Mich. 87.

[29]
Id., § 465, p. 574, People v. Hoffman, supra, 142 Mich. 531.

[30]
Id., § 465, p. 574, citing People v. Whitney, 105 Mich. 622.

counsel to desist, and this is a matter which the judge has a right to control in the orderly conduct of the business of the court".

We respectfully submit, after reading counsel's admirable presentation of this point, that there is nothing so shocking to one's sense of justice in the trial court's rulings on the scope and manner of cross-examination of the prosecutrix, as to warrant the conclusion that the petitioner was denied a fair trial or that he lost his liberty without due process of law.

(b) Or to his contention that the conduct of the prosecuting officials prevented a fair trial?

Counsel's contention here is based largely on alleged prejudicial remarks of the prosecuting attorney and his chief assistant during the course of the trial. There are certain inconsistencies in this argument. While it is said that the case was tried 'in the throes of sensationalism probably unique in Michigan's history' (126), and that 'newspaper publicity was so extreme as probably to be without parallel in the state's history' (126), counsel states with commendable frankness that the jury was confined during the course of a trial lasting 17 days including the holiday season of Easter and he opines that the jurors were thereby rendered impatient (forgetting their sworn duty as citizens); and he intimates that the prosecutors capitalized on the extreme excitement and prejudice.

We have carefully read the remarks on which counsel predicated his assignments of error, and, without repeating them, we respectfully suggest that the situation disclosed is merely one to be expected in the trial of a criminal cause where experienced, capable and competent counsel are engaged in conflict.

"Great care should be taken by prosecuting officers and trial courts, that no statement be made in the presence of the jurors which might jeopardize the defendant's right to a fair trial. But, in the haste and zeal of a trial, it is humanly impossible to obtain absolute perfection, and of necessity some allowance must be made to determine whether impromptu remarks are prejudicial. Statements should not be held prejudicial if they are made in good faith, and, when fairly construed, do not appear to have been such as to have influenced the jury adversely to the rights of the accused".[31]

Or, putting it another way:

"While the duty is cast upon the prosecuting attorney of seeing that the defendant has a fair trial, he is not required to be supine, nor is he required to apologetically present the people's case. He is entitled to display a reasonable amount of vigor, and, unless he transgresses the rules of conduct his position as a public officer requires, he should not be condemned by the court".[32]

It will also be found in many of the instances cited by counsel that the trial judge, when objection was offered to alleged prejudicial remarks made in the heat of trial, admonished counsel to refrain therefrom, or ordered the remark stricken. This cured the error, if any, we respectfully submit.

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[31]
Gillespie, Mich. Crim. Law & Pro., Vol. I, § 488, p. 596.

[32]
Id., p. 595, citing People v. Nemer, 218 Mich. 163; People v. Burnstein, 261 Mich. 534.

(c) Or that the attitude of the trial court prevented a fair trial?

It is contended, petition, pp. 23-24, that the attitude, remarks and conduct of the trial court, as shown by the record, 'are subject substantially to the criticism directed against the prosecuting officials, and denied petitioner due process by rendering a fair trial impossible'.

Again reference is had to the alleged 'extreme public excitement, tension, and pre-judgment of petitioner', and it is urged that petitioner's motion for a continuance should have been granted (2, 113, 127).

Unfortunately, perhaps, the motion for continuance is not published in the printed record, but be that as it may we respectfully submit that sensational press coverage of a crime of this nature is not of itself sufficient to justify the adjournment of a trial unless there is further evidence of actual public hostility. And the same principle has been applied to applications for change of venue.

> "People in this country do not take for truth, everything that is published in a newspaper. The jury well know that they are to be governed only by the evidence and the law".
>
> *State v. Norris,* 2 N.C. 429; 1 Am. Dec. 564.[33]

Moreover, under Michigan law,[34] 'the trial of criminal cases shall take precedence over all other cases' and

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[33]

Annotations on the subject will be found in: State v. Gordon, 32 N.D. 31; 155 N.W. 59; Ann. Cas. 1918 A, 442, at 449; State v. Rasor, 168 S.C. 221; 167 S.E. 396; 86 A.L.R. 1237, 1249.

[34]

Mich. Code of Criminal Procedure, chap. 8, § 2 (3 Comp. Laws 1929, § 17295; Mich. Stat. Ann. § 28.1025).

'no adjournments, continuances or delays shall be granted by any court except for good cause shown'; even adjournments by consent of counsel for the prosecution and accused is proscribed unless in the discretion of the court it shall clearly appear by sufficient showing that the reasons for such consent are founded upon strict necessity 'and that the trial of said cause cannot be then had without a manifest injustice being done'.

And under the decisions of her highest court,[35] the continuance of a criminal trial lies within the sound discretion of the trial judge; the burden is on the party claiming abuse of such discretion to show it; and prejudice to a defendant in a criminal prosecution must be apparent or proved to have been at least probable.

In the case at bar, the prejudice or lack of prejudice on the part of prospective jurors was sifted out on voir dire examination, which is the accepted practice in Michigan.[36]

As the Supreme Court of Michigan has well said:[37]

> "Newspaper reports are ordinarily regarded as too unreliable to influence a fair-minded man when called upon to pass upon the merits of a case in the light of

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[35]

People v. Williams, 118 Mich. 692; People v. Burby, 218 Mich. 46; People v. Crawford, 218 Mich. 125; People v. Raider, 256 Mich. 131; People v. Schneider, 309 Mich. 158.

[36]

People v. Swift, 172 Mich. 473, 481; People v. Burns, 242 Mich. 345, 350; People v. Raider, 256 Mich. 131, 134; People v. Schneider, 309 Mich. 158, 163, 165.

[37]

People v. Schneider, 309 Mich. 158.

evidence given under oath; and it is now a well-settled rule that a juror, although he may have formed an opinion from reading such reports, is competent if he states that he is without prejudice and can try the case impartially according to the evidence, and the court is satisfied he will do so''. From 24 Cyc. 298.

Counsel also complain that throughout the trial the judge, without justification, sharply reprimanded petitioners' counsel for acts required by professional duty, and that he repeatedly made remarks and evidenced an attitude toward counsl which must have had the effect of conveying to the jury that counsel was merely wasting everybody's time (96-103).

It will be noted that the criticism which the trial judge leveled at defense counsel was that he repeated questions on cross-examination, over and over and over again. We think the criticism, given in the mildest terms, was quite justified (96-103). And we find in the record no objection or complaint of such remarks.

Colloquys of this nature between court and counsel are not unusual in the trial of causes, 'and especially in criminal causes, and the average juror knows and understands it. He does not charge up against the client all the unpleasant things that may be said to counsel'.[38]

We respectfully submit the attitude of the trial court did not prevent a fair trial.

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[38]

Gillespie, Mich. Criminal Law & Procedure, § 462, p. 570; citing People v. Kimbrough, 193 Mich. 330.

(d) Or that the destruction of the scientific evidence by the Detroit police department precluded a fair trial?

Destruction of such evidence may have been careless, but there is no evidence of a deliberate intent to deprive the accused of due process of law, as in *Mooney v. Holohan*, 294 U.S. 103, where it was contended that the prosecution was based on perjured testimony known by the prosecuting officials to be perjured. For, if counsel is correct, any negligence of a police officer in the handling of such exhibits would preclude the prosecution of any accused involved in such a situation.

It is our thought that the credibility of the expert witnesses was for the jury, and that the destruction of the exhibits by one of the witnesses bore merely on such credibility.

(e) Or that petitioner was denied due process by Michigan's failure to protect against, judicially inquire into, and correct alleged influences claimed to have contaminated the jury?

1. We respectfully submit the nylon stocking episode is too trivial for this Court's serious consideration, and we do not propose to dwell upon it.

2. Counsel for the defense moved the court to declare a mistrial on the ground that a newspaper article to the effect that petitioner had confessed may have come to the attention of the jury and unduly influenced them (18-20). The answer is, we think, that the jury were segregated during the trial; that every reasonable precaution was taken to isolate them from outside influences (19); that when counsel for petitioner directed attention to the pub-

lication of the newspaper article, the trial judge inquired of the jury (20, Tr. 910) whether anyone of them read anything in the daily press; whether they heard anything outside of the testimony taken from the stand about the case; and whether anyone of them heard anything that might prejudice anyone of them in their deliberations. None of the jurors answered that he had; one of them (we presume it was the foreman) answered 'No'. We cannot agree with counsel that the officers should have been interrogated. The matter, we think, lay within the discretion of the trial judge, and he handled a difficult situation admirably.

We respectfully submit the trial court was not dissolved when this episode occurred.

(f) Or that the Supreme Court of the State of Michigan denied equal protection of the laws in refusing to grant appeal?

Appeal in Michigan is a matter of judicial discretion, and in criminal cases it is not one of right (see footnotes 17, 18, 19, and 20). The court below in this case carefully examined and considered petitioner's application, just as it examines and considers hundreds of such petitions during the course of a year.

We respectfully submit there is nothing in this record to indicate that the Supreme Court of Michigan denied equal protection of the laws in refusing to grant appeal.

Point Three

Questions now presented in their federal aspect, were decided by the courts below on adequate and independent nonfederal grounds.

The questions presented to the court or original jurisdiction were, we respectfully suggest, decided on adequate, indepent nonfederal grounds.

As we have observed in this brief, when discussing each question raised in the petition for certiorari, the trial court in its proceedings was guided solely by well-established Michigan law, both statutory and judicially declared.

Without needless repetition, we invite the Court to consider that in Michigan the scope of cross-examination lies within the trial court's discretion; that the trial judge has control of court proceedings and in exercise of such power supervises the conduct of counsel; that the remarks of the court made during the course of trial, of which counsel now complain, were merely necessary in pronouncing judgment on objections raised by either side; that the result of the careless destruction of scientific evidence was for the jury's appraisal, and the question is governed by the rules of evidence; and that the other matters discussed in the petition for certiorari were those which lie within the sound discretion of any trial court.

We, therefore, respectfully submit that the questions presented were decided by the courts below on adequate and independent nonfederal grounds.

VI

Conclusion.

We respectfully submit, with all due respect for the zeal of counsel, that the petitions for writs of certiorari to the Supreme Court of the State of Michigan and the trial court, should be denied.

Respectfully Submitted,

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Supreme Court of the United States

OCTOBER TERM, 1948

Nos. 103, 104

FRANK LOBAIDO, *Petitioner,*

v.

THE PEOPLE OF THE STATE OF MICHIGAN.

PETITION FOR REHEARING OF ORDER DENYING PETITIONS FOR WRITS OF CERTIORARI.

Preliminary Statement.

In his petitions for writs of certiorari, petitioner urged as reasons for granting the writs that the judicial process of Michigan considered in its totality denied petitioner an essentially fair trial. Petitioner then argued in detail the elements of the essential unfairness. These seemed to counsel clearly to require granting the writs and therefore other substantial reasons controlling this Court's exercise of its discretionary certiorari jurisdiction were not presented. There are, therefore, substantial grounds available to petitioner although not previously presented, within Rule 33 of the rules of this Court.

The guidance in the rules of this Court respecting the appropriateness of certiorari to state courts appears in Rule 38, Paragraph 5(a), which provides:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
> "(a) Where a state court has decided *a federal question of substance not theretofore determined by this court*, or has decided it in a way probably not in accord with applicable decisions of this court." (Italics added)

The purpose of this petition is to show that sound judicial discretion dictates the granting of certiorari because (a) the Michigan courts have decided federal questions of substance not theretofore determined by this Court, Michigan's action on one question violating petitioner's rights under the Sixth Amendment as absorbed by the Fourteenth Amendment;[1] (b) other policy considerations show the need for the writs. This petition is submitted to present these substantial grounds available to petitioner although not previously presented, that a travesty on the administration of justice may not go uncorrected for want of complete presentation.

1. Michigan's denial of cross-examination is either expressly condemned by Alford v. United States, 282 U. S. 687, or such denial raises a federal question of substance not theretofore determined by this Court, and violates petitioner's right of cross-examination guaranteed by the Sixth Amendment as absorbed by the Fourteenth Amendment.

The facts of denial of cross-examination are documented in the petitions for certiorari herein (pp. 15, 18-21), but it

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[1] If *Alford* v. *United States*, 282 U. S. 687, is controlling here, then, as shown in the text herein in Point 1, Michigan's denial of cross-examination constitutes the decision of a federal question of substance in a way not in accord with an applicable decision of this Court—the alternative basis for granting certiorari.

was not shown this Court that such denial squarely conflicts with *Alford* v. *United States*, 282 U. S. 687. In that case this Court said:

> "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. Knapp v. Wing, 72 Vt. 334, 340, 47 A. 1075; Martin v. Elden, 32 Ohio St. 282, 289. *It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.*" (p. 692, italics added).
>
> "* * * * The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross examination. This was an abuse of discretion and prejudicial error." (p. 694.)

In the case at bar, petitioner's trial counsel was cut off *in limine* on a subject that goes to the heart of the conviction herein. Thus, after the seven-year-old complainant had given the incredible testimony that she had not mentioned the alleged intercourse nor attempted murder at any time to her mother,[2] this was completely foreclosed as a field of inquiry:

> "Mr. Fitzpatrick (Petitioner's Trial Counsel): Why didn't you talk to your mother about that?
> Mr. O'Brien (Prosecuting Attorney): I object to that.
> Mr. Fitzpatrick: Why?
> The Court: Sustain the objection.
> Mr. Fitzpatrick: May I ask them to state on the record the basis of the objection.

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[2] The People had refused to endorse the mother as a material witness, and the trial court denied petitioner's motion that she be so endorsed (R. 2, 63-67).

> Mr. Shemanske (Assistant Prosecuting Attorney). The Court has sustained the objection. The Court don't need any explanation." (R. 99).

Precisely such foreclosure of cross-examination is directly condemned by *Alford* v. *United States, supra:*

> "* * * * The trial court cut off *in limine* all inquiry on a subject with respect to which the defense was entitled to a reasonable cross examination. This was an abuse of discretion and prejudicial error." (p. 694.)

The *Alford* case on its facts seems conclusive here. In that case the witness "was examined at great length" on other aspects of his testimony (282 U. S. at 691), just as was the witness in this case,[2a] but the proceedings were considered essentially unfair because the trial court cut off *in limine* certain proper cross-examination, just as the trial court did here. Indeed, the case at bar is *stronger* on its facts than the *Alford* case. There, the witness, although an important one, was not the *complainant,* as here. And, as noted from the above quotation from the record, trial counsel in the case at bar was even precluded from finding out *why* his entirely proper and essential cross-examination was stopped *in limine.*

It is true that the *Alford* case dealt with a federal prosecution, but the late Chief Justice (then Justice) Stone, in there condemning the foreclosure of cross-examination, used the very words that define the states' obligation under the Fourteenth Amendment—"*It is the essence of a fair trial* that reasonable latitude be given the cross-examiner * * * *" (282 U. S. at 692, italics added).

However, if the *Alford* case is deemed not controlling here, then Michigan's denial of cross-examination raises the following federal question of substance not determined by this Court: Is the right of confrontation guaranteed by the Sixth Amendment, in so far as it includes and pre-

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[2a] However, cross-examination of the witness in this case was seriously curtailed in additional vital matters. See Petitions for Certiorari, pp. 18-21.

scribes the right of cross-examination, absorbed by the Fourteenth Amendment?

The right of confrontation clearly includes and prescribes the right of cross-examination, *Kirby* v. *United States,* 174 U. S. 47, 55; *Dowdell* v. *United States,* 221 U. S. 325, 329-330; *People* v. *Hermes,* 73 Cal. App. (2d) 947, 168 P. (2d) 44, 48. Indeed, the right of cross-examination is of the essence of confrontation, for where there has been cross-examination at a previous trial or upon the taking of a deposition, the right of confrontation is deemed accorded thereby so that actual confrontation at the trial is not always necessitated by the Sixth Amendment. *Reynolds* v. *United States,* 98 U. S. 145, 161; *Mattox* v. *United States,* 156 U. S. 237, 242; cf. *West* v. *Louisiana,* 194 U. S. 258, 263.[3]

We sincerely urge that the right of confrontation, at least to the extent that it includes and prescribes cross-examination, must now be deemed absorbed by the Fourteenth Amendment, and this should be settled by this Court. Cf. *Snyder* v. *Massachusetts,* 291 U. S. 97, 106. Certainly in our system of adversary litigation of criminal responsibility, the right of cross-examination is as much a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental", *Snyder* v. *Massachusetts,* 291 U. S. 97, 105, and "of the very essence of a scheme of ordered liberty", *Palko* v. *State of Connecticut,* 302 U. S. 319, 325, as are other guarantees of the Bill

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[3] Note that *West* v. *Louisiana* merely decided that the use in a state trial of a deposition, under specified restrictions, where there had been *opportunity of cross-examination,* does not deny due process; *denial of cross-examination* was not involved. Nor does the Court's general statement, in that case, that the Sixth Amendment does not apply to proceedings in state court, control the case at bar today. As much has been said generally of the whole Bill of Rights; yet many of its specific provisions, none more important procedurally than the right of cross-examination, are now deemed absorbed by the Fourteenth Amendment. Contrast, for example, *Gaines* v. *Washington,* 277 U. S. 81, 85 and *Betts* v. *Brady,* 316 U. S. 455, 461-462, with *Snyder* v. *Massachusetts,* 291 'U. S. 97, 106.

of Rights already held or assumed by this Court to have been absorbed by the Fourteenth Amendment, for example, the right to counsel, *Powell* v. *Alabama*, 287 U. S. 45, 67-71; the prohibition of cruel and unusual punishments and double jeopardy, *Francis* v. *Resweber*, 329 U. S. 459, 462; the right of an accused to be informed of the accusation against him, see *Snyder* v. *Massachusetts*, 291 U. S. 97, 105; the right to a public trial and opportunity for defense, *In re Oliver*, 333 U. S. 257. At this very term, this Court has for decision whether the Fourth Amendment's guarantee against unreasonable searches and seizures has been absorbed by the Fourteenth Amendment. *Wolf* v. *Colorado*, cert. granted, April 26, 1948, 333 U. S. 879.

The instant case poses a constitutional question the importance of which *at least equals* any of the foregoing problems, and such question is squarely raised for this Court's decision:[4] Is the right of confrontation guaranteed by the Sixth Amendment, insofar as it includes and prescribes the right of cross-examination, absorbed by the Fourteenth Amendment?

2. Michigan's destruction of the scientific evidence raises a federal question of substance not theretofore determined by this Court.

The facts of such destruction, and the argument that due process was denied by the destruction of objective scientific evidence, probably conclusive, *before trial* and before opportunity of petitioner to examine and appraise it, are set forth in the petitions herein (pp. 10-15, 24-27), but petitioner did not point out that this raises an important federal question not determined by this Court, although the

[4] Denial of his right of cross-examination was expressly urged by petitioner in the Michigan court to be violative of his right to an essentially fair trial guaranteed by the federal Constitution (R. 103; petitioner's Brief in Support of Application for Leave to Appeal to Michigan Supreme Court, p. 1, included in certified transcript but not printed in this Court).

lower federal courts sustain petitioner's position. *Curtis* v. *Rives*, 123 F. (2d) 936, 938 (App. D. C.); *Hicks* v. *Hiatt*, 64 F. Supp. 238, 245-246 (D. C. Pa.). Neither petitioner nor respondent could cite a decision of this Court governing the situation. This is a most appropriate case in which to consider and decide such question. The frivolous excuse given for the destruction of the scientific evidence—that there was no room to keep it (Tr. 1765)—in the light of the retention of other bulky exhibits such as clothing and a large garbage can (Tr. 1906), inevitably implies deliberate suppression of the scientific evidence. But even assuming that such destruction was only negligent—and respondent concedes that "Destruction of such evidence may have been careless * * * *" (Brief Opposing Petition for Certiorari, p. 22)—an important federal question is raised for this Court. See Britt, Blood-Grouping Tests and the Law: The Problem of "Cultural Lag", 21 Minn. L. Review 671. Constantly increasing scientific knowledge and the resulting improvement in the administration of justice by its utilization in the judicial process, render it most important for this Court to consider and decide: Is a State free under the due process clause to destroy *before trial* scientific evidence of complete objectivity, probably conclusive, and thereby obtain a conviction which it likely could not obtain had the evidence not been destroyed?

3. Need for certiorari to clarify jurisdictional rules applicable to this Court's certiorari jurisdiction in Michigan cases.

Because the Supreme Court of Michigan in denying petitioner's application for leave to appeal entered only an order "that the application be and the same is hereby Denied" (R. 124), it was and is uncertain whether the petition to this Court should request that certiorari issue to the Supreme Court of Michigan or to the Recorder's Court for the City of Detroit, since it can not be known whether the Michigan Supreme Court's action constitutes an assump-

tion of jurisdiction and an affirmance, and hence a final reviewable judgment, or a refusal to take jurisdiction, leaving the trial court's decision the final reviewable judgment. Cf. *Western Union Tel. Co.* v. *Crovo,* 220 U. S. 364; *Norfolk & S. Turnpike Co.* v. *Virginia,* 225 U. S. 264; *Mathews* v. *Huwe,* 269 U. S. 262; *Myers* v. *International Trust Co.,* 273 U. S. 380; *Tumey* v. *Ohio,* 273 U. S. 510; *Western Union Tel. Co.* v. *Priester,* 276 U. S. 252; *Chesapeake & O. Ry. Co.* v. *Kuhn,* 284 U. S. 44.

Petitioner could find no case coming to this Court on certiorari from Michigan where Michigan's Supreme Court had denied application for leave to appeal, and apparently respondent also could not. Therefore petitioner felt constrained to petition for certiorari to both courts, since his election of the wrong court would have caused the time to lapse in respect of the correct court. Thus petitioner was put to the additional burden and expense of petitioning in respect of both courts and docketing two cases in this Court. This problem and burden will doubtless confront every future Michigan petitioner to this Court whose application for leave to appeal is denied by the Michigan Supreme Court, until the issue is settled by this Court. There is, therefore, this sound and independent policy reason, not heretofore presented in the petitions, for this Court's exercise of its certiorari jurisdiction to clarify this matter for future Michigan petitioners,[5] and those of all states with comparable appellate procedure.

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[5] Whether, when the Michigan Supreme Court denies appeal, its action or the trial court's action constitutes the final reviewable judgment, is a serious and difficult unanswered problem, and is not to be confused with the procedure for this Court's procurement of the record, which presents no problem since this Court can obtain a record from any court. Cf. *Department of Banking* v. *Pink,* 317 U. S. 264, 267; *Atherton* v. *Fowler,* 91 U. S. 143, 146.

Conclusion.

Thus there are substantial grounds justifying and requiring granting certiorari, which grounds, although available to petitioner, have not heretofore been presented to this Court.

It is sincerely urged that this is a case where the essential unfairness of the Michigan proceedings requires this Court to resolve all doubts it may have about the substantiality of such grounds in favor of granting the writs, whatever this Court's reluctance to interfere with State proceedings.

For to deny certiorari is to let stand a conviction carrying imprisonment that unquestionably will last for life (R. 2), based upon proceedings in a civil court in the United States of America, which did not accord the essentials of fairness even to the degree accorded by the Nazis to their minions in court martial proceedings—all in direct and flagrant violation of the Constitution of the United States.[6]

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[6] Petitioner's petitions for writs of certiorari documented the essential unfairness of the prosecuting officials (pp. 21-23), of the trial judge (pp. 23-24), and of the tribunal itself resulting from contamination of the jury (pp. 28-30) and under Rule 33 these cannot be reargued here. The petitions, however, did not point out, as they should have, that the police matron who procured the nylon stockings for the jurors was not, as in some jurisdictions, merely a court bailiff who might logically be assumed by jurors to be an officer of the court and hence a disinterested person, cf. 28 U. S. Code 755 (new), but rather an employee of the police department and naturally assumed by the jurors to be an agent of the prosecution (R. 108-111), just as the police were its agents in testifying for it (R. 17, 25, 29, 31, 42). The method of appointment and duties of police matrons in Michigan, as prescribed by statute, Mich. Stat. Ann. Secs. 5-3302-5.3308, make clear that such police matrons are not court-appointed bailiffs but agents of the police department.

Wherefore, it is respectfully urged that this petition for rehearing be granted, that the order denying certiorari be vacated, and that the petitions for writs of certiorari be granted.

Respectfully submitted,

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The foregoing petition for rehearing, filed under Rule 33 of the rules of this Court, is presented in good faith and not for delay, and is restricted to grounds specified in Paragraph 2 of said Rule.

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